AUG 2 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO._____, OCTOBER TERM, 1973

74-5176

DANIEL EDWARD HENRY,
JOHN THOMAS KIRBY,
KENNETH WAYNE McLEAN
DAVID ALAN HAECKER,
A. C. JACKSON
AUBRY DUGLASS MIMS,
and STEPHEN L. BRAY II and
MICHAEL A. NESS, Intervenors,
Individually and on behalf of all
persons similarly situated,

Petitioners

vs.

J. William Middendorf, II,
HONORABLE ~~JOHN E. WARNER~~, Individually
and in his capacity as Secretary of
the Navy; ADMIRAL ELMO ZUMWALT, U.S.
Navy, Individually and in his capacity
as Chief of Naval Operations; GENERAL
ROBERT E. CUSHMAN, U.S. Marine Corps,
Individually and in his capacity as
Commandant, U.S. Marine Corps;
BRIGADIER-GENERAL F. C. LANG, U.S.
Marine Corps, Individually and in his
capacity as Commander, Marine Corps
Air Station, El Toro, Santa Ana,
California; and MAJOR GENERAL H. S.
HILL, U.S. Marine Corps, Individually
and in his capacity as Commander, Third
Marine Aircraft Wing, Marine Corps Air
Station, El Toro, Santa Ana, California.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403

Telephone: 213-784-2058

and

A. L. WIRIN, FRED OKRAND,
LAURENCE R. SPERBER
633 S. Shatto Place
Los Angeles, California 90005

Telephone: 213-487-1720

Attorneys for Petitioners

SUBJECT INDEX

	Page
Citations to Opinions Below	2
Jurisdiction.	2
Questions Presented	2
Constitutional Provisions, Statutes, and Regulations Involved.	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion.	8

INDEX TO APPENDICES

Appendix A.	Statutes and Regulations Involved	1
Appendix B.	Order Below Vacating Judgment . .	4
Appendix C.	Order Below Denying Petition for Rehearing	5

TABLE OF AUTHORITIES CITED

	Page
Cases	
Argersinger v. Hamlin, 407 U.S. 25	2,5
Betonie v. Sizemore, et al., 496 F. 2d 1001 . . .	6,7
Daigle v. Warner, 490 F. 2d 358	5,6,8
Statutes	
Title 28 U.S.C. § 1254 (1)	2
Title 10 U.S.C.A. § 801 et seq.	3
Title 10 U.S.C.A. § 820	3
Title 28 U.S.C. § 2241 et seq.	5
Title 28 U.S.C. § 1361	5
Rules	
Rule 23 (b) (3) and (c), Federal Rules of Civil Procedure	5
Regulations	
Paragraphs 79 a, b, c, and d, Manual for Courts-Martial (Rev. Ed. 1969)	3
Constitutional Provisions	
U.S. Constitution, Fifth Amendment	2,3,6,7
U.S. Constitution, Sixth Amendment	2,3,6,7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

DANIEL EDWARD HENRY,
JOHN THOMAS KIRBY,
KENNETH WAYNE McLEAN
DAVID ALAN HAECKER,
A. C. JACKSON
AUBRY DUGLASS MIMS,
and STEPHEN L. BRAY II and
MICHAEL A. NESS, Intervenors,
Individually and on behalf of all
persons similarly situated,

Petitioners

vs.

HONORABLE JOHN E. WARNER, Individually and in his capacity as Secretary of the Navy; ADMIRAL ELMO ZUMWALT, U.S. Navy, Individually and inhis capacity as Chief of Naval Operations; GENERAL ROBERT E. CUSHMAN, U.S. Marine Corps, Individually and in his capacity as Commandant, U.S. Marine Corps; BRIGADIER-GENERAL F. C. LANG, U.S. Marine Corps, Individually and in his capacity as Commander, Marine Corps Air Station, El Toro, Santa Ana, California; and MAJOR GENERAL H. S. HILL, U.S. Marine Corps, Individually and in his capacity as Commander, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 27, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported in 357 F. Supp. 495 (1973). The order of the United States Court of Appeals for the Ninth Circuit is reported in the advance sheets and a copy of said order is presented in Appendix B, infra, page 4 .

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on March 27, 1974. Its order denying a Petition for Rehearing and the suggestion for a rehearing en banc was entered on May 23, 1974. A copy of said order is presented in Appendix C, infra, page 5. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions, as interpreted and applied in Argersinger v. Hamlin, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial.

2. Whether the Fifth Amendment's guarantee of due process of law requires the military to appoint counsel, who does not represent the prosecution, to assist the accused in every trial before a summary court-martial which may result in imprisonment.

3. Whether a district court may by mandamus extend the scope of its judgment beyond the territorial limits of its district.

4. Whether a district court may, by writ of habeas corpus, extend the scope of its judgment beyond the territorial limits of its district.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The provisions of the United States Consitution involved are the "Assistance of Counsel" clause of the Sixth Amendment and the "Due Process" clause of the Fifth Amendment. The specific statute involved, as set forth in full in Appendix A, infra, is 10 U.S.C.A. § 820, which is part of the Uniform Code of Military Justice (10 U.S.C.A. 801 et seq). The regulations involved, as set forth in full in Appendix A, infra, are Paragraphs 79a, b, c, and d, Manual for Courts-Martial (Rev. Ed. 1969).

STATEMENT OF THE CASE

Petitioners are members of the United States Marine Corps (U.S. Navy) who have been charged with minor offenses which constitute violations of the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq. Petitioners HENRY and KIRBY were charged with "unauthorized absence"; Petitioner McLEAN was charged with "unauthorized absence", "misbehavior of sentry on post" and "disrespect to a noncommissioned officer." Each of the three named above was convicted by a summary court-martial at which he was not represented by counsel and each was sentenced to confinement for a period not to exceed 30 days. Petitioners HAECKER, JACKSON, and MIMS, and the intervening Petitioners BRAY and NESS were all charged with similar infractions and ordered to stand trial at summary court-martial at which no legal counsel would be provided.

Upon request in chambers by the district court to Respondents-Defendants, no summary court-martial was conducted with respect to charges against Petitioners HAECKER, JACKSON, and MIMS prior to issuance of judgment in the action.

Intervenors BRAY and NESS were each convicted by a summary court-martial at which they were not represented by counsel and each was sentenced to confinement for a period not to exceed 30 days.

A verified petition for a Writ of Habeas Corpus of Petitioners HENRY, KIRBY, and McLEAN, individually and on behalf of all persons similarly situated, together with the Complaint of said Petitioners and of Petitioners HAECKER, JACKSON, and MIMS, individually and on behalf of all persons similarly situated, for injunctive, mandamus, and declaratory relief, and motions for a temporary restraining order and preliminary injunction, order designating action as a class action, and order allowing Petitioner-Plaintiffs to proceed in forma pauperis, were filed on February 16, 1973, in the district court.

Later the district court permitted BRAY and NESS to intervene as petitioners, ordered issuance of a Writ of Habeas Corpus as to KIRBY, BRAY and NESS and their immediate release from confinement pending further order of court with regard to their respective convictions and sentencing by summary courts-martial; and ordered Respondent-Defendants to refrain from conducting any summary courts-martial within the territorial jurisdiction of the court without affording the accused the assistance of counsel, where such proceeding might result in confinement of the accused, pending further order of court.

The district court also ordered that the Petitioner-Plaintiffs and Intervenors, each and all, be allowed to proceed in forma pauperis.

Following hearing, the district court filed and entered its Memorandum Opinion in the action on April 13, 1973, and its Judgment on April 17, 1973, granting Petitioners

relief as a class pursuant to Rule 23 (b)(3) and (c) of Federal Rules of Civil Procedure, in the form of habeas corpus pursuant to 28 U.S.C. § 2241 et seq., and in the nature of mandamus pursuant to 28 U.S.C. § 1361. The writ of habeas corpus was granted specifically on behalf of Petitioners HENRY and McLEAN in addition to that previously granted on behalf of the other named Petitioners, and on behalf of every member of the designated class.

The judgment ordered Respondents-Defendants to release said Petitioners and said class members from confinement and to direct their agents to insure that no summary courts-martial be conducted by the Navy or Marine Corps anywhere in the world unless and until the constitutional requirements of Argersinger v. Hamlin, supra, as specified in the order, are satisfied.

Finding that Navy regulations do not permit retrial of summary courts-martial, the district court ordered the findings of guilty and the sentences of Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS vacated and their service records expunged of any reference thereto.

Respondents-Defendants appealed said judgment to the United States Court of Appeals for the Ninth Circuit. The latter on March 27, 1974, in an Order which it designated to be published, and "Under the compulsion" of that Court's opinion in Daigle v. Warner, 490 F. 2d 358 (9th Cir. 1973), ordered the orders and judgment of the district court vacated and the cause remanded to the district court for reconsideration in the light of Daigle. That Order also stated that two of the members of the three-judge panel that issued said Order "disagree with the holding of Daigle" and that "All members of this panel, however, follow Daigle because it is the law of this circuit".

Petitioners' Petition for Rehearing and suggestion for a rehearing en banc was rejected by an Order filed and entered on May 23, 1974.

Hearing on filing and spreading the judgment of the Court of Appeals in the district court has been continued to September 9, 1974.

REASONS FOR GRANTING THE WRIT

There is a conflict of opinion on the first two questions presented by this petition. As stated above, the Ninth Circuit panel in the instant case followed under "compulsion" the opinion in Daigle. The latter, issued on October 24, 1973, held that the "Sixth Amendment's guarantee of counsel in criminal prosecutions, as interpreted and applied in Argersinger v. Hamlin 407 U.S. 25 (1972)" is not applicable to trials before summary courts-martial, and that the "Fifth Amendment's guarantee of due process of law" does not require "the military to appoint counsel in every case in which the defendant is sentenced to confinement".

The United States Court of Appeals for the Fifth Circuit on July 5, 1974, in an opinion covering the four cases of Betonie v. Sizemore, et. al., Timmons v. Carrier, Tova v. Carrier, and Lynch v. Sizemore, et al., 496 F. 2d 1001, ruled on these two questions with conclusions diametrically opposed to that of the Ninth Circuit in Daigle.

The contrary opinion by the Fifth Circuit in Betonie, et al., was rendered with full knowledge of the Ninth Circuit's view on these questions, as the opinion cites Daigle after the statement: "Some courts have held that the Sixth Amendment does not protect defendants in courts-martial". 496 F. 2d at 1007. (The Ninth Circuit Order in the instant case was also brought to the attention of the Fifth Circuit Court at oral argument in Betonie.)

The Fifth Circuit's opinion continues at 1007:

> "But the weight of authority seems to be strongly in favor of the proposition that, although the perameters of the rule may not be identical to those in civilian proceedings, there is a right to counsel in courts-martial."

(Citations, including the district court opinion in the instant case, 357 F. Supp. 495 (1973)).

The Fifth Circuit's opinion further states at 1008:

> "We thus conclude that both the Fifth and Sixth Amendments require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment."

Thus there is a clear conflict on the first two questions here presented, with the Ninth Circuit aligned against the Fifth and Tenth Circuits and the Court of Claims and the U.S. Court of Military Appeals. (See citations in Betonie, et al., 496 F. 2d at 1007.)

Another reason for the granting of the writ was perhaps best stated by Judge Ely in his comment supplementing the Order issued by the Ninth Circuit in the instant case in which he stated that "if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, facing much graver consequences, should be entitled to the same consideration."

That view, shared by the majority of the panel which decided the instant case in the Ninth Circuit, could not be

followed by that panel only because of the contrary precedent set by the Daigle opinion. It appears that the question whether the Daigle opinion should be nullified can only be answered by granting of the writ in the instant case.

With regard to the third and fourth questions presented herein, which were also raised below, no direct determination was made by the Court of Appeals in its order vacating the orders and judgment of the district court in following the opinion in Daigle. Those issues were not raised in the Daigle case. The questions as to scope of judgment of a district court are presented here for consideration as a material part of the instant case as it was treated below.

CONCLUSION

For all of the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nathan R. Zahm

NATHAN R. ZAHM
A. L. WIRIN, FRED OKRAND, and
LAURENCE R. SPERBER

Attorneys for Petitioners

Dated: August 19, 1974

APPENDIX A

Title 10 U. S. C. A. § 820 - Article 20, Uniform Code of Military Justice

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

As amended Oct. 24, 1968, Pub.L. 90-632, § 2(6), 82 Stat. 1336.

Manual for Courts-Martial, (Rev. Ed. 1969)- Chapter XIV

79. **SUMMARY COURTS-MARTIAL.** ***a. Function.*** The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form. The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, the court will refer the matter to the convening authority. See 33*d*.

-/-

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment which may be adjudged upon conviction; and

That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See 70*b*(3).

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at

-2-

once to find the accused guilty. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accussed full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c;* app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b*(2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL EDWARD HENRY, etc., et al., individually and on behalf of all persons similarly situated, and STEPHEN L. BRAY, II, and MICHAEL A. NESS, Intervenors,

Plaintiffs-Appellees,

vs.

HONORABLE JOHN E. WARNER, individually and in his capacity as Secretary of the Navy, et al.,

Defendants-Appellants.

No. 73-1694

ORDER

[March 27, 1974]

[PUBLISH]

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges.

Under the compulsion of this court's opinion in *Daigle v. Warner* (9th Cir. 1973) 490 F.2d 358, the orders and judgment are ordered vacated and the cause is remanded to the district court for reconsideration in the light of *Daigle*.*

*Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts martial, without the limitations placed upon that right by the majority of the *Daigle* panel. Judge Ely adds his thought that if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, facing much graver consequences, should be entitled to the same consideration. Judge Trask adheres to his views expressed, concurring and dissenting, in *Daigle*. All members of this panel, however, follow *Daigle* because it is the law of this circuit.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO 3-29-74—480

APPENDIX-C

FILED

MAY 23 1974

CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL EDWARD HENRY, etc., et al., individually and on behalf of all persons similarly situated, and STEPHEN L. BRAY, II, and MICHAEL A. NESS, Intervenors, Plaintiffs-Appellees, v. HONORABLE JOHN E. WARNER, individually and in his capacity as Secretary of the Navy, et al., Defendants-Appellants.	No. 73-1694

O R D E R

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges.

The Clerk is directed to file the untimely Petition for Rehearing and suggestion for rehearing en banc. The Clerk is further directed to file the "Ex Parte Application For Permission To File Memorandum Of Late Reported Decision," received in the Clerk's office on May 6, 1974.

The panel as constituted in the above case has voted to deny the Petition for Rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. 35(b) Fed. R. App. P.

The Petition for Rehearing is denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges

FPI-Barcelona
8-30-69-4CM-4371

DISTRIBUTED
OCT 15 1974

RECEIVED
OCT 15 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 74-5176

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

ORIGINAL COPY

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General.

Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5176

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

In February, 1973, petitioners--then members of the United States Marine Corps who had been convicted and sentenced by summary courts-martial or were awaiting trial by summary courts-martial--brought this class action in the United States District Court for the Central District of California challenging the authority of the military to try them at summary courts-martial without providing assistance of counsel. The district court determined that in light of Argersinger v. Hamlin, 407 U.S. 25--in which this Court held that the Sixth Amendment prohibits imprisonment for misdemeanors or petty offenses unless the accused has been represented by counsel or has waived that right--accused servicemen at summary courts-martial must be

provided the opportunity to be represented by counsel. The court granted substantially all the requested relief, including the release of those petitioners who were then confined and an injunction (of world-wide scope) prohibiting the Navy and Marine Corps from conducting summary courts-martial resulting in confinement unless the accused servicemen were advised of their rights under Argersinger and unless, in the absence of waiver, they were provided counsel both prior to and during the court-martial proceedings (357 F. Supp. 495).

While this case was on appeal, the Ninth Circuit decided Daigle v. Warner, 490 F.2d 353.[1/] There, the court ruled that this Court's holding in Argersinger did not apply to summary courts-martial, but that the Due Process clause of the Fifth Amendment did require counsel to be made available to the accused at summary courts-martial under some circumstances.[2/] Accordingly, the Ninth Circuit in the instant case vacated the orders and judgment of the district court and remanded for reconsideration in the light of Daigle.

1/ A petition for a writ of certiorari was filed by some of the servicemen in that case sub nom. Crosby v. Middendorf, No. 73-6542. We are sending petitioners a copy of our memorandum acquiescing in that petition.

2/ Adopting the due process standards for revoking probation set forth in Gagnon v. Scarpelli, 411 U.S. 778, with special reference to military exigencies, the court of appeals held (490 F.2d at 365):

> [C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced.

On August 20, 1974, the accused servicemen filed this petition for a writ of certiorari, in which they contend that both the Fifth and Sixth Amendments require the military services to provide counsel to an accused in any summary court-martial which may result in imprisonment. On August 24, 1974, the government also petitioned for a writ of certiorari in the instant case. J. William Middendorf v. Daniel Edward Henry, No. 74-175. In that petition we assert that the Constitution does not require, under any circumstances, that the military services provide counsel to an accused in a summary court-martial. We also argue that the Ninth Circuit, by allowing Daigle to control the disposition of this case, improperly gave that decision retroactive effect.

We incorporate here what we said in that petition, which sets forth in greater detail the facts of this case and explains why it is important for this Court to resolve the issues there presented. We believe that our petition fairly raises all the relevant issues. But should this Court conclude that since the court of appeals agreed with our contention that the Sixth Amendment does not apply to summary courts-martial, the government's petition does not properly present the Sixth Amendment issue, the instant petition should be granted to preserve that question. Cf. Strunk v. United States, 412 U.S. 434.

If the instant petition is granted, the grant should be limited to questions 1 and 2 which involve petitioners' Fifth and Sixth Amendment claims. Their additional questions

presented, whether a district court may, by writ of mandamus or habeas corpus, "extend the scope of its judgment beyond the territorial limits of its district" (Pet. 2-3) should be denied. This issue was not treated by the court of appeals and therefore should not be addressed by this Court. See Parker v. Levy, No. 73-206, decided June 19, 1974, slip op. 27. In any event, a district court does not have that power. See Schlanger v. Seamans, 401 U.S. 487; Ahrens v. Clark, 335 U.S. 188.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176 (consolidated with No. 74-5175)

DANIEL EDWARD HENRY, JOHN THOMAS KIRBY, KENNETH WAYNE McLEAN, DAVID ALAN HAECKER, A.C. JACKSON, AUBRY DUGLASS MIMS, and STEPHEN L. BRAY, II and MICHAEL A. NESS, Intervenors, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, Individually and in his capacity as Secretary of the Navy; ADMIRAL JAMES L. HOLLOWAY, III, U.S. Navy, Individually and in his capacity as Chief of Naval Operations; GENERAL ROBERT E. CUSHMAN, U.S. Marine Corps, Individually and in his capacity as Commandant, U.S. Marine Corps; BRIGADIER-GENERAL R.W. TAYLOR, U.S. Marine Corps, Individually and in his capacity as Commander, Marine Corps Air Station, El Toro, Santa Ana, California; and MAJOR GENERAL WILLIAM R. QUINN, U.S. Marine Corps, Individually and in his capacity as Commander, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403

A.L. WIRIN and FRED OKRAND
ACLU Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Petitioners

Of Counsel:

DAVID F. ADDLESTONE

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

A motion to proceed on the original record was made and granted. There is, therefore, no printed appendix in this case.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. THE SIXTH AMENDMENT'S PROVISION FOR ASSISTANCE OF COUNSEL APPLIES TO THE ACCUSED IN ALL SUMMARY COURTS-MARTIAL	11
A. It is not expressly or by necessary implication inapplicable to military trials	11
B. Military necessity does not render the constitutional right inapplicable	16
C. There is historical support for application of the constitutional right to courts-martial	18
D. Disputed historical documentation cannot be controlling in constitutional interpretation	20
E. Modern realities must be considered in constitutional interpretation	21
II. *GIDEON'S* AND *ARGERSINGER'S* ABSOLUTE STANDARD OF DUE PROCESS OF LAW REQUIRES ASSISTANCE OF COUNSEL IN SUMMARY COURTS-MARTIAL	25

Page

A. Summary courts-martial are criminal prosecutions by legislative and judicial definition 25

B. Consequences of summary courts-martial can be "grave" 30

C. Military personnel are no better equipped than civilians to defend themselves at trial 31

D. Due process requires that a judge not serve also as prosecutor 33

E. District court opinion allows for military exigencies 34

F. Absolute right to counsel required under due process 34

III. THE DISTRICT COURT'S JURISDICTION EXTENDED TO RESPONDENTS BEYOND ITS TERRITORIAL LIMITS UNDER THE MANDAMUS AND HABEAS CORPUS STATUTES AND COMPLIANCE WITH PROVISIONS OF 28 U.S.C. 1391(e) 36

A. Top military authorities are "custodians" for purposes of habeas corpus 36

CONCLUSION 43

APPENDIX "A" (Manual for Courts-Martial, 1969 (Rev.), Par. 79) 1a

TABLE OF AUTHORITIES

Cases:

Application of Stapley, 246 F.Supp. 316 (1965) 14

Altmayer v. Laird, 148 F.2d 161 (1945) 14

Angle v. Laird, 429 F.2d 892 (1970) 14

Argersinger v. Hamlin, 407 U.S. 25 (1972) ..... *passim*

Page

Betonie v. Sizemore, 496 F.2d 1001 (1974) ..... *passim*

Betts v. Brady, 316 U.S. 455 (1942) 34

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) 42

Brown v. Board of Education, 347 U.S. 483 (1954) 21

Burns v. Wilson, 346 U.S. 844 (1953) 9, 12, 13, 25

Burns v. Wilson, 346 U.S. 844 42

Daigle v. Warner, 490 F.2d 358 (1973) ..... *passim*

Daigle v. Warner, 348 F.Supp. 1074 (1972) 34, 37

Denton v. United States, 144 Ct. Cl. 840 (1959) 14

Douglas v. California, 372 U.S. 353 (1963) 16

Dr. Bonham's Case, 8 Co.Rep. 114(a), 77 Eng. Rep. 647 (1610) 33

Eisentrager v. Forrestal, 174 F.2d 961 (1949) 42

Ex parte Milligan, 71 U.S. 2 (1866) 13

Ex parte Richard Quirin, 317 U.S. 1 (1942) 13

Ex parte Schollenberger, 96 U.S. 369 (1877) 36

Gallagher v. United States, 191 Ct. Cl. 546 (1970) 14

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 26, 27

Gideon v. Wainwright, 372 U.S. 335 (1963) 26, 34

Gompers v. United States, 233 U.S. 604 (1914) 29

Harris v. Ciccone, 417 F.2d 479 (1969) 14

Harris v. Nelson, 394 U.S. 286 (1969) 41

Henry v. Warner, 357 F.Supp. 495 (1973) 1, 17, 34, 37, 38, 40, 42

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) 23

Industrial Addition Ass'n v. Co. of Internal Revenue, 323 U.S. 310 (1945) 36

Jones v. Cunningham, 371 U.S. 236 (1963) 39

Page

Kennedy v. Commandant, 377 F.2d 339 (1967) 14, 32

McCulloch v. Maryland, 4 Wheat. 316 (1819) 24

Mempa v. Rhay, 389 U.S. 128 (1967) 23, 35

Mercelis v. Wilson, 235 U.S. 579 (1915) 36

Miller v. Laird, 464 F.2d 533 (1972) 40

Minnesota v. Hitchcock, 185 U.S. 373 (1901) 36

Missouri v. Holland, 252 U.S. 416 (1920) 24

Noyd v. Bond, 395 U.S. 683 (1969) 15

Oregon v. Mitchell, 400 U.S. 112 (1970) 20, 22

Parisi v. Davidson, 405 U.S. 34 (1972) 27

Parker v. Levy, 94 S.Ct. 2547 (1974) 12

Reid v. United States, 211 U.S. 529 (1908) 36

Robb v. United States, 456 F.2d 768 (1972) 15

Romero v. Squier, 133 F.2d 528 (1943) 14

Schlanger v. Seamans, 401 U.S. 487 (1971) 40

Shapiro v. United States, 107 Ct. Cl. 650 (1947) 14

Shaughnessy v. Pedreiro, 349 U.S. 49 (1955) 39

Smith v. Campbell, 450 F.2d 829 (1971) 39, 40, 42

Smith v. Hiatt, 170 F.2d 61 (1948) 14

Smith v. McNamara, 395 F.2d 61 (1968) 14

Strait v. Laird, 406 U.S. 341 (1972) 42

Tumey v. Ohio, 273 U.S. 510 (1927) 33

United States v. Alderman, 22 USCMA 298, 46 CMR 298 (1973) ..... *passim*

United States v. Armbruster, 11 USCMA 596, 29 CMR 412 (1960) 12, 17

United States v. Cruse, 22 USCMA 324 (1973) 14

United States v. Culp, 14 USCMA 199, 33 CMR 411 (1963) 13, 15, 19

Page

United States v. Ferry, 22 USCMA 339 (1973) 14

United States v. Henry, 22 USCMA 328 (1973) 14

United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960) 13, 15

United States v. Kazmierczak, 16 USCMA 594, 37 CMR 214 (1967) 24

United States v. Ross, 22 USCMA 353 (1973) 14

United States v. Seda, 22 USCMA 341 (1973) 14

United States v. Shamel, 22 USCMA 361 (1973) ... 14, 28, 29

United States ex rel. Meadows v. State of New York, 426 F.2d 1176 (1970) 42

United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953) 13

United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967) 12, 15

United States v. Wade, 388 U.S. 218 (1966) 22

United States ex rel. Armstrong v. Wheeler, 321 F.Supp. 471 (1970) 41

Ward v. Monroeville, 409 U.S. 57 (1972) 33

Webb v. Beto, 362 F.2d 105 (1966) 42

Williams v. Fanning, 332 U.S. 490 (1947) 39

Williams v. Florida, 399 U.S. 78 (1970) 22

Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) 20, 21

Constitution and statutes:

United States Constitution:

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

Fourteenth Amendment 20

28 U.S.C. 1254 (1) 2

28 U.S.C. 1361 ..... 7, 37, 41

Page

28 U.S.C. 1391(e) 5, 10, 36, 37, 38, 40, 41

28 U.S.C. 2241 ..... 7, 37

Uniform Code of Military Justice:
10 U.S.C. 815 (Art. 15) 28, 29
10 U.S.C. 816 (Art. 16) 3
10 U.S.C. 820 (Art. 20) 3

Miscellaneous:

Congressional Record:
Senate Report No. 1911, Vol. 108 (Part 6) 29
Senate Report No. 1992, 87th Cong.2d Sess. (1962) 41

Federal Rules of Civil Procedure, Rule 23(b)(3) and (c) 7
Rule 81(a)(2) 41

Manual for Courts-Martial, 1969 (Rev.)
Par. 79 ..... 4, 1a
Par. 8, 18(b)(1) 137 28
Par. 16(b), 126(c)(3) and (e) 30
Par. 127(c) 27, 28
Par. 137 31

Secretary of the Navy Message No. 082237Z/52, June 8, 1973 17

Other Authorities:

Fidell, The Summary Court-Martial: A Proposal, 8 Harv. Law Journal on Legislation 571 (1971) 31

Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L.R. 293 (1957) 18

Miller, A Long Look at Article 15, 28 Mil. L.R. 37 (1965) 29

Note, An Historical Argument For the Right To Counsel During Police Interrogation, 73 Yale L.J. 1000 (1964) 35

Page

tenBroek, Use By The United States Supreme Court of Extrinsic Aids in Constitutional Construction, 26 & 27 Calif. L. R. (1938 & 1939) 20

Warren, The Bill of Rights And The Military, 37 N.Y.U. L.R. 181 (1961) 23

Wiener, Courts Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. R. 1 (1958) 18, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176 (consolidated with No. 74-175)

DANIEL EDWARD HENRY, JOHN THOMAS KIRBY, KENNETH WAYNE McLEAN, DAVID ALAN HAECKER, A.C. JACKSON, AUBRY DUGLASS MIMS, and STEPHEN L. BRAY, II and MICHAEL A. NESS, Intervenors, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, Individually and in his capacity as Secretary of the Navy; ADMIRAL JAMES L. HOLLOWAY, III, U.S. Navy, Individually and in his capacity as Chief of Naval Operations; GENERAL ROBERT E. CUSHMAN, U.S. Marine Corps, Individually and in his capacity as Commandant, U.S. Marine Corps; BRIGADIER-GENERAL R.W. TAYLOR, U.S. Marine Corps, Individually and in his capacity as Commander, Marine Corps Air Station, El Toro, Santa Ana, California; and MAJOR GENERAL WILLIAM R. QUINN, U.S. Marine Corps, Individually and in his capacity as Commander, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported in 357 F.

Supp. 495 (1973), and is set out in App. C., Pet. for Cert., Case No. 74-175, p. 4a. The United States Court of Appeals for the Ninth Circuit rendered no opinion in connection with its order other than a notation. A copy of said order is presented in App. A., Pet. for Cert., Case No. 74-175, p. 1a.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on March 27, 1974. Its order denying a Petition for Rehearing and rejecting the suggestion for a rehearing en banc was entered on May 23, 1974. A copy of said order is presented in App. B., Pet. for Cert., Case No. 74-175, p. 3a. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

Article 20 of the Uniform Code of Military Justice (10 U.S.C. 820) provides:

"Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay."

Article 16 of the Uniform Code of Military Justice (10 U.S.C. 816) provides:

"The three kinds of courts-martial in each of the armed forces are–

(1) general courts-martial consisting of–

(a) a military judge and not less than five members; or

(b) only a military judge if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of–

(a) not less than three members; or

(b) a military judge and not less than three members; or

(c) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(b) so requests; and

(3) summary courts-martial, consisting of one commissioned officer."

Paragraph 79 of the *Manual for Courts-Martial*, 1969 (rev.), constitutes the regulation on Summary Courts-Martial prescribed by the President as authorized by Article 36 of the Uniform Code of Military Justice (10 U.S.C. 836). Provisions of that regulation are set out in full in Appendix A, infra, p. 1a.

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions, as interpreted and applied in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial.

2. Whether the Fifth Amendment's guarantee of due process of law requires the military services to appoint

counsel, who does not represent the prosecution, to assist the accused in every trial before a summary court-martial in which a sentence of confinement is imposed.

3. Whether a federal district court may extend the scope of its mandamus order beyond its territorial limits under the provisions of 28 U.S.C. 1391(e).

4. Whether a federal district court may extend the scope of its writ of habeas corpus beyond its territorial limits under the provisions of 28 U.S.C. 1391(e).

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary manner.

Petitioners were members of the United States Marine Corps (U.S. Navy) who had been charged with minor offenses which constitute violations of the Uniform Code of Military Justice, 10 U.S.C. Section 801 et seq. Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS were charged with "unauthorized absence"; Petitioner McLEAN was also charged with "misbehavior of sentry on post" and "disrespect to a noncommissioned officer." Each of them was convicted by a summary court-martial at which he was not represented by his own counsel and was sentenced to confinement at hard labor for 30 days, except NESS, who was so sentenced for 27 days. Petitioners HAECKER, JACKSON and MIMS were all charged with various similar infractions and ordered to stand trial at

summary court-martial at which they had been informed no legal counsel would be provided.

Upon request in chambers by the district court to Respondents-Defendants, (who, except for CUSHMAN, were individuals who have been succeeded in office by the respective respondents named herein), no summary court-martial was conducted with respect to charges against Petitioners HAECKER, JACKSON and MIMS prior to issuance of judgment in the action.

A verified petition for a Writ of Habeas Corpus of Petitioners HENRY, KIRBY and McLEAN, individually and on behalf of all persons similarly situated, together with the Complaint of said Petitioners and of Petitioners HAECKER, JACKSON and MIMS, individually and on behalf of all persons similarly situated, for injunctive, mandamus, and declaratory relief, and motions for a temporary restraining order and preliminary injunction, order designating action as a class action, and order allowing Petitioner-Plaintiffs to proceed *in forma pauperis*, were filed on February 16, 1973, in the district court. (R.1)

Later the district court permitted BRAY and NESS to intervene as Petitioners, ordered issuance of a Writ of Habeas Corpus as to KIRBY, BRAY and NESS and their immediate release from confinement pending further order of court with regard to their respective convictions and sentencing by summary courts-martial; and ordered Respondent-Defendants to refrain from conducting any summary courts-martial within the territorial jurisdiction of the court without affording the accused the assistance of counsel, where such proceeding might result in confinement of the accused, pending further order of court. (R. 182)

The district court also ordered that the Petitioner-Plaintiffs and Intervenors, each and all, be allowed to proceed *in forma pauperis.* (R. 255)

Following hearing, the district court filed and entered its Memorandum Opinion in the action on April 13, 1973 (R. 252) and its Judgment on April 17, 1973 (R. 268), granting Petitioners relief as a class pursuant to Rule 23(b)(3) and (c) of Federal Rules of Civil Procedure, in the form of habeas corpus pursuant to 28 U.S.C. 2241 et seq., and in the nature of mandamus pursuant to 28 U.S.C. 1361. The writ of habeas corpus was granted specifically on behalf of Petitioners HENRY and McLEAN in addition to that previously granted on behalf of the other named Petitioners, and on behalf of every member of the designated class.

The judgment ordered Respondents-Defendants to release said Petitioners and said class members from confinement and to direct their agents to insure that no summary courts-martial be conducted by the Navy or Marine Corps anywhere in the world unless and until the constitutional requirements of *Argersinger v. Hamlin,* supra, as specified in the order, are satisfied.

Finding that Navy regulations do not permit retrial of summary courts-martial, the district court ordered the findings of guilty and the sentences of Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS vacated and their service records expunged of any reference thereto.

Respondents-Defendants appealed said judgment to the United States Court of Appeals for the Ninth Circuit. (R. 272 and 274) The latter on March 27, 1974, in an Order which it designated to be published, and "under the compulsion" of that Court's opinion in

Daigle v. Warner, 490 F.2d 358 (9th Cir. 1973). (App. G, Pet. for Cert., Case No. 74-175, p. 26a) ordered the orders and judgment of the district court vacated and the cause remanded to the district court for reconsideration in the light of *Daigle*. That Order also stated that two of the members of the three-judge panel that issued said Order "disagree with the holding of *Daigle*" and that "All members of this panel, however, follow *Daigle* because it is the law of this circuit". (App. A, Pet. for Cert., Case No. 74-175, p. 1a).

Petitioners' Petition for Rehearing and suggestion for a rehearing en banc was rejected by an Order filed and entered on May 23, 1974. (App. B, Pet. for Cert., Case No. 74-175, p. 3a).

Hearing on filing and spreading the judgment of the Court of Appeals in the district court has been continued by that court to a date unspecified following disposition of this case by this Court.

SUMMARY OF ARGUMENT

1. A United States military authority which confines, or acts on the premise that it may confine military personnel for any period of time under sentence of summary court-martial conviction resulting from trial at which the accused, as an indigent, was not, or will not be, provided assistance of counsel, violates the Sixth Amendment's provision for assistance of counsel and the Fifth Amendment's guarantee of due process of law, as interpreted and applied by this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

2. That military personnel retain constitutional rights which must be protected by military courts has not

been controverted since this Court's decision in *Burns v. Wilson*, 346 U.S. 137 (1953); correspondingly, the United States Court of Military Appeals, which is the "Military Supreme Court", holds that the protections in the Bill of Rights, "except those which are expressly or by necessary implication inapplicable", are available to military personnel.

3. Historical data supports the view that the framers of the Sixth Amendment intended its guarantee of assistance of counsel to apply to courts-martial, particularly as *no* exception of "cases arising in the land or naval forces, or in the Militia" was written into the Sixth as was provided in the Fifth Amendment's requirement for a presentment or indictment of a Grand Jury. Thus, since this Court's decision in *Argersinger*, the United States Court of Military Appeals and the United States Court of Appeals for the Fifth Circuit have held not merely that the Sixth Amendment's right to counsel provision applies to courts-martial, but specifically to summary courts-martial. That view is supported by this Court's holdings that seek to preserve maximum constitutional rights for men in service.

4. Military necessity for maintaining discipline does not render inapplicable to military personnel the constitutional guarantee of assistance of counsel, whether its source be the Sixth Amendment or the Fifth Amendment's due process of law clause.

5. It is uncontroverted that the Fifth Amendment affords due process of law to the accused at trial before courts-martial. This court in *Argersinger* extended the due process requirement of assistance to counsel to criminal prosecutions in which imprisonment is

imposed, regardless of the degree of seriousness of the offense. As summary courts-martial are criminal prosecutions in which an accused may be sentenced to confinement, the *Argersinger* determination as to the Fifth Amendment's due process requirement for assistance of counsel has been held to apply to summary courts-martial without limitations by the United States Court of Military Appeals and by the United States Court of Appeals for the Fifth Circuit. That view should be affirmed by this Court, even if the Sixth Amendment provision for assistance of counsel is found not to be applicable to the military.

6. Where, as here, in personam jurisdiction has been acquired and venue requirements satisfied by service of process in accordance with the provisions of 28 U.S.C. Section 1391(e), a district court's judgment and orders in the nature of mandamus and writ of habeas corpus are jurisdictionally effective as directed to Respondents-Defendants who reside outside the territorial jurisdiction of the court and are custodians of the Petitioners, including those who as members of a class are confined outside the court's territorial jurisdiction. A military "custodian" for purposes of habeas corpus may be any official or officer who has directive power over the immediate jailer.

ARGUMENT

I.

THE SIXTH AMENDMENT'S PROVISION FOR ASSISTANCE OF COUNSEL APPLIES TO THE ACCUSED IN ALL SUMMARY COURTS-MARTIAL.

A. It is not expressly or by necessary implication inapplicable to military trials.

The panel of judges of the Ninth Circuit Court of Appeals which decided the instant case without an opinion did so "(U)nder the compulsion of" a preceding panel's opinion in *Daigle v. Warner*, 490 F.2d 358 (1973), with the holding of which two of the three members of the instant panel disagree. A petition for a writ of certiorari by the appellees in *Daigle* (sub. nom. *Crosby, et al. v. Warner*, No. 73-6642) is still pending before this Court.

In order to support the prayer of Petitioners that the appellate court's order herein should be vacated and the judgment and orders of the district court should be affirmed by this Court, it is therefore necessary to present argument with regard specifically to the holding of the Ninth Circuit in *Daigle*. It is thus a denial of the validity of the holding in *Daigle*, and affirmation of contrary holdings by other federal appellate courts, that Petitioners seek from this Court, and to which argument here is directed.

Specifically, Petitioners contend, contrary to the holding in *Daigle*, that the Sixth Amendment guarantee of assistance of counsel applies to summary courts-martial, and that the Fifth Amendment's due process of

law clause, as interpreted by this Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to require assistance of counsel in criminal prosecutions where imprisonment is imposed, also applies to summary courts-martial without limitations specified in *Daigle*.

This Court implicitly confirmed in *Parker v. Levy*, 94 S. Ct. 2547 (1974), the view of Chief Justice Vinson in *Burns v. Wilson*, 346 U.S. 137, 142 (1953) that "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." As stated in *United States v. Tempia*, 16 USCMA 629, 634, 37 CMR 249, 254 (1967):

> "The impact of *Burns v. Wilson*, supra, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials."

In the same opinion (16 USCMA at p. 634), the United States Court of Military Appeals, recognized as the "Military Supreme Court" (*United States v. Armbruster*, 11 USCMA 596, 29 CMR 412, 414 (1960)), said:

> ". . . both the Supreme Court and this Court itself are satisfied as to the applicability of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication."

Mr. Justice Douglas, dissenting in *Parker v. Levy*, supra, pointed out at p. 2566 that:

> ". . . the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need 'for a presentment

> or indictment' of a grand jury 'in cases arising in the land or naval forces . . .'."

Chief Judge Quinn of the Court of Military Appeals identified the only necessarily *implied* limitation in his dissenting opinion in *United States v. Sutton*, 3 USCMA 220, 11 CMR 220, 228 (1953) (after referring to the Fifth Amendment express exemption), as follows:

> "To this express exception may be added the implied limitation of the right of trial by jury, as protected by the Sixth Amendment, to the extent that a jury trial is required only where presentment or indictment is necessary. *Ex parte Richard Quirin*, 317 US 1, 87 L ed 3, 63 S Ct 2; *Ex Parte Milligan*, 71 US 2, 18 L ed 281. No other recognized exceptions have been cited and I know of none. The opinions of the appellate courts in the *Burns* case, supra, supports the conclusion that there are no other exceptions."

It should be noted that the dissenting opinion in *Sutton* became the majority position of the Court of Military Appeals in 1960 when that court overruled *Sutton* in *United States v. Jacoby*, 11 USCMA 428, 430-31, 29 CMR 244, holding that ". . . the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."

Accordingly, it appears that the applicability of the Sixth Amendment provision for assistance of counsel to servicemen is not expressly excepted by the Constitution and no court has held it inapplicable by necessary implication. To the contrary, the Court of Military Appeals and other federal courts have held that the right to counsel under the Sixth Amendment *is* applicable to military trials. *United States v. Culp*, 14

USCMA 199, 33 CMR 411 (1963); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); *Denton v. United States*, 144 Ct. Cl. 840, 863, cert. den., 361 U.S. 821 (1959); *Gallagher v. United States*, 191 Ct. Cl. 546, 423 F.2d 1371, cert. den., 400 U.S. 849 (1970); *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968), cert. den. 394 U.S. 934 (1969); *Kennedy v. Commandant*, 377 F.2d 339, 343 (10th Cir. 1967); *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965).

The following decisions, based on the issue as to whether, in view of the Sixth Amendment, counsel at courts-martial may be a non-lawyer, implicitly hold that the right to counsel provision of the Sixth Amendment applies to military courts: *Romero v. Squier*, 133 F.2d 528, 531-32 (9th Cir. 1943); cert. den. 318 U.S. 785; *Altmayer v. Sanford*, 148 F.2d 161, 162 (5th Cir. 1945); *Smith v. Hiatt*, 170 F.2d 61, 64 (3rd Cir. 1948), rev'd on other grounds, 336 U.S. 695; *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969); and *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970).

Most recently, both the Court of Military Appeals and the Court of Appeals for the Fifth Circuit have held specifically that the Sixth Amendment right to counsel applies to *summary* courts-martial. *United States v. Alderman*, 22 USCMA 298, 46 CMR 298 (1973); *Betonie v. Sizemore*, 496 F.2d 1001 (1974). Following *Alderman*, the Court of Military Appeals ruled similarly in other 1973 cases. See *United States v. Cruse*, 22 USCMA 324; *United States v. Henry*, 22 USCMA 328; *United States v. Ferry*, 22 USCMA 339; *United States v. Seda*, 22 USCMA 341; *United States v. Ross*, 22 USCMA 353; and *United States v. Shamel*, 22 USCMA 361.

It appears that the Ninth Circuit is the *only* federal appellate court which has reached a contrary conclusion with respect to the Sixth Amendment right to counsel, the *Daigle* opinion seemingly contravening even the Ninth Circuit view in *Romero v. Squier*, supra, and deliberately contravening the position of the "Military Supreme Court" in *Alderman, Tempia, Culp* and *Jacoby*, supra.

The suggestion stemming from this Court and Congress that the special expertise of the Court of Military Appeals should be given deference in decisions on military matters by other federal courts was made by the United States Court of Claims in *Robb v. United States*, 456 F.2d 768 (1972), which declared at p. 771:

> "We acknowledge the special competence of the Court of Military Appeals. Its expertise in administering military justice has already been explained by the Supreme Court in *Noyd v. Bond* supra, 395 U.S. at 694, 89 S. Ct. at 1883:
>
> > 'When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.' "

And further, 456 F.2d at pp. 771-772:

> "... we do find significance in Congress' special deference toward the Court of Military Appeals where that court rules against the Government. This being so, we think that civilian courts should normally follow, without the usual independent

examination, a Court of Military Appeals ruling on an issue of jurisdiction under military law which favors the court-martial defendant."

B. Military necessity does not render the constitutional right inapplicable.

It is to be noted that the *Daigle* opinion with regard to the applicability of the Sixth Amendment is *not* grounded on the finding of an express exception or necessary implication. It is not even grounded on the argument of "military necessity", as the *Daigle* panel negates that position with this language, 490 F.2d at p. 366:

> "While the Navy argues with some vigor that naval discipline will suffer severely if appointed counsel are required, there is scant support for this in the record. The Army and Air Force already provide counsel to all accused before summary courts-martial and the Navy allows private retained counsel to participate in such proceedings.
>
> "The Navy suggests that the effectiveness of a summary court-martial as a tool for preserving discipline and order will be undermined by the participation of counsel. If so, this must already be true as to those defendants who can afford retained counsel. *Cf. Douglas v. California*, 372 U.S. 353 (1963)."

In this respect, the *Daigle* opinion agrees with that portion of Judge Duncan's concurring opinion in *Alderman*, 22 USCMA at p. 303, which holds that military necessity does *not* require rejection of applicability "of the *Argersinger* rule" to military courts:

"Beginning with the premise, as I do, that with certain exceptions criminal constitutional standards announced by the United States Supreme Court are applicable as precedent to this Court, . . . unless there is demonstrated a military necessity demanding nonapplicability, the constitutional determination reached in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), applies to criminal actions brought within the system of military justice. The record contains no evidence which convinces me that application of the *Argersinger* rule should not be followed in our system because of military necessity. Conversely, it has come to our attention that both the United States Air Force and United States Army currently apply the ruling to summary court-martial procedures. See *Henry v. Warner*, No. 73-354-DWW (CD Cal April 13, 1973)." (357 F. Supp. 495).

Further with regard to "military necessity", it should be noted that the Navy and Marine Corps have joined the Army and Air Force in complying with the requirements of the "Argersinger rule" since June, 1973, in providing assistance of counsel at summary courts-martial where confinement is to be imposed. The Navy and Marine Corps have been doing so in compliance with the ruling of *Alderman*, supra, in accordance with the holding in *United States v. Armbruster*, supra, 11 USCMA at p. 598, that decisions of the United States Court of Military Appeals "are binding upon the military." The Secretary of the Navy on June 8, 1973, issued an "ALNAV" order to all commands to conduct summary courts-martial in accordance with the holding in *Alderman*. (Message No. 082237Z/52.)

C. There is historical support for application of the constitutional right to courts-martial.

Analysis of the *Daigle* opinion leads to the conclusion that the only apparent basis for the panel's singular view as to application of the Sixth Amendment's right of counsel is its insistence on the position that "in the late 18th century the right of an accused before a court-martial to have assistance of counsel for his defense was severely limited". 490 F.2d at p. 364. For such historical analysis, the panel relied only on, and cited at p. 364, Wiener, *Courts Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958).

Not mentioned in the *Daigle* opinion, and thus apparently overlooked or ignored, is an equally scholarly historical study on the same subject one year earlier by Gordon D. Henderson (like Weiner, a Harvard Law School graduate) which reached a conclusion contrary to that of Wiener. The Henderson article, entitled *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957), declares at pp. 317-318 that prior to and since the adoption of the Sixth Amendment ". . . it was traditional to allow the accused legal assistance" at courts-martial.

The Fifth Circuit in *Betonie*, 496 F.2d at p. 1007 cites both of the Harvard Law Review articles for comparison and makes the observation that ". . . the traditional meaning of the (Sixth) amendment is not clear". As between the two articles, however, the Fifth Circuit's conclusion implicitly supports the Henderson view, with full knowledge that the Ninth Circuit panel

in *Daigle* had preferred to be swayed by the Wiener view. (The *Daigle* decision preceded that of *Betonie* and is cited in the latter opinion at p. 1007).

Since the United States Court of Military Appeals came into existence in 1951, there have been eight judges who have served with that court, including the three now serving. Only *one* of the eight has specifically agreed with the Weiner view. Six of them either have preferred the Henderson view or have decided the constitutional issue without reliance on either. The seventh, Hon. William Cook, has not had occasion to consider the question, having first taken his seat in August, 1974.

In *United States v. Culp*, supra, Judge Kilday was alone in his preference for the Wiener view, but he conceded, 14 USCMA at pp. 211-212, that there are "treatises and articles containing categorical statements to the effect that . . . 'it was traditional to allow the accused legal assistance', 'courts-martial always admit counsel for the prisoner', and others of similar import". Even the *Daigle* panel concedes, 490 F.2d at p. 363 that there *is* historical support "for the conclusion that the framers of the Bill of Rights intended the Sixth Amendment right to counsel to apply to trials before courts-martial."

It is clear, therefore, that there is no uniformity of opinion as to the "original understanding" on this constitutional provision.

D. Disputed historical documentation cannot be controlling in constitutional interpretation.

The "original understanding" of the framers of the constitution, if it is positively established by documentation beyond dispute, has been utilized by this Court in constitutional interpretation in many instances. But "original understanding" has certainly not been the *exclusive* factor, as was cogently pointed out by Prof. Jacobus tenBroek in his series of five articles in Volumes 26 and 27 of the California Law Review, 1938 and 1939, entitled "*Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*".

One of the key points emphasized by Prof. tenBroek in his study is that courts properly rely on historical data as to "original intention" only where such data is uncontroverted and established beyond doubt. This point was made by Mr. Justice Brennan in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in an opinion partly concurring and partly dissenting on an issue involving interpretation of the Fourteenth Amendment, at p. 278:

> "The historical record left by the Framers . . . is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its Framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record . . ."

In a similar vein, Mr. Justice Jackson pointed to the problem of contradictory "authority" in *Youngstown*

Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), at pp. 634,35:

> "A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems . . . as they actually present themselves. Just what out forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."

E. Modern realities must be considered in constitutional interpretation.

Even if it were undisputed that "the right of an accused before a court-martial to have assistance of counsel for his defense was severely limited" in the late 18th century, and that "there was no right to have personal, adversary counsel of the sort required in state and federal courts by *Argersinger*", (*Daigle*, 490 F.2d at p. 364), it seems clear that this Court is not bound today to assign to the Sixth Amendment a meaning limited to the time-pattern of the 18th Century.

As Chief Justice Warren declared in *Brown v. Board of Education*, 347 U.S. 483 (1954), at p. 492:

> ". . . we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."

And Mr. Justice Harlan, who was so intent on historical documentation, conceded in 1970 in *Oregon v. Mitchell*, 400 U.S. at p. 202, supra, that:

> "It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change, the Constitution in a sense changes as well."

With specific reference to current interpretation of the Sixth Amendment's guarantee of assistance of counsel, this Court said in *United States v. Wade*, 388 U.S. 218 (1966), at 224-225:

> "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. *In recognition of these realities of modern criminal prosecution*, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." (See Footnote No. 3, p. 224; emphasis added.)

Similarly with regard to the Sixth Amendment, this Court declared in *Williams v. Florida*, 399 U.S. 78 (1970), at pp. 102-3:

> "To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require

considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions."

See also *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), and Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.R. 181, 187-188 (1961).

Most enlightening is the following statement in the *Wiener* article, supra, 72 Harv. L. Rev. at pp. 301-302 strongly urging a position *contrary* to that of the *Daigle* panel which relied on its data:

"The present paper has demonstrated that the Founders did not intend the Bill of Rights to apply to the minuscule Army and non-existent Navy of 1789-1791, *but it does not follow* that they would have been led to a similar conclusion had they been dealing with the greatly enlarged armed forces and greatly widened military jurisdiction that are with us today." (Emphasis added; see also 72 Harv. L. Rev. at pp. 8-11, 294, and 304 on this point.)

In taking this position, Wiener was apparently guided by the now-classic statement on constitutional interpretation made by Chief Justice Hughes in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) at p. 442-43:

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the

> conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a *constitution* we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407); 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely that of what was said a hundred years ago.'."

Whichever view of the "original practice" one is inclined to adopt as to assistance of counsel at military trials, it would seem that the controlling doctrine should be that expressed by the Court of Military Appeals in *United States v. Kazmierczak*, 16 USCMA 594, 599, 37 CMR 214 (1967):

> "A thick coat of tradition . . . is no assurance of constitutional acceptability."

II.

GIDEON'S AND *ARGERSINGER'S* ABSOLUTE STANDARD OF DUE PROCESS OF LAW REQUIRES ASSISTANCE OF COUNSEL IN SUMMARY COURTS-MARTIAL.

A. Summary courts-martial are criminal prosecutions by legislative and judicial definition.

The Ninth Circuit panel in *Daigle* concedes that this Court's holding in *Burns v. Wilson*, supra, necessitates its ruling that "Courts-martial are required to afford an accused due process of law". 490 F.2d at p. 364. But that panel improperly placed limitations upon the right of due process in summary courts-martial which are not required by the United States Court of Military Appeals (*Alderman*), nor by the Court of Appeals for the Fifth Circuit (*Betonie*). Further, the majority of the Ninth Circuit panel which decided the instant case made clear that it disagreed with this holding of the *Daigle* panel (though following *Daigle* "because it is the law of this Circuit"), in adding to its order by asterisk the following:

> "Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts, without the limitations placed upon that right by the majority of the *Daigle* panel. (App. A, Pet. for Cert., Case No. 74-175, p. 1a).

Recognizing that the *Argersinger* decision, as constituted by the "various opinions of the members of the Supreme Court", was bottomed either on the Sixth

Amendment right of an accused to be represented by counsel "or upon the Fifth Amendment right to be afforded due process of law", Judge Duncan in his concurring opinion in *Alderman*, at p. 303, did not impose any limitations to the *Argersinger* due process view in applying it to summary courts-martial. Nor did Judge Quinn in his majority opinion.

Concluding that *both* the Fifth and Sixth Amendments "require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment", the Fifth Circuit in *Betonie* declined to make any distinction between summary courts-martial and others. At pp. 1007-8, 496 F.2d, the court said:

> "Counsel for appellants argues that because the penalties imposed by a summary court-martial are minor, counsel should not be required. Nevertheless, imprisonment is a possibility, as these cases demonstrate, and *Argersinger* holds that in all such cases, counsel is required. The Navy also argues that imprisonment is not as much of a burden for military personnel as it is for civilians. However, it defies common sense to think that incarceration in a military prison is not a sufficiently serious punishment to require the presence of counsel."

The Ninth Circuit panel in *Daigle*, on the contrary, chose not to apply to summary courts-martial the absolute standard of due process mandated by *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Argersinger*, but rather a due process standard suggested by this Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). 490 F.2d at pp. 364-65.

The analogy to *Gagnon* is made on the initial assumption that summary courts-martial, like probation and parole revocation hearings, are "situations where

confinement may be imposed, but the Sixth Amendment does not apply." 490 F.2d at p. 364. Petitioners contend that the Sixth Amendment *does* apply to summary courts-martial, for the reasons hereinbefore stated, but even if the Ninth Circuit were to be upheld in its view as to the Sixth Amendment, the *Daigle* panel's limitations on due process cannot be supported by analogy to *Gagnon*.

This is so because the analogy cannot withstand close analysis. First, probation and parole revocation hearings are *not* criminal prosecutions, whereas summary courts-martial proceedings most definitely *are*, both by legislative and judicial definition.

This Court held in *Gagnon*, 411 U.S. at p. 782, that:

> "Probation revocation, like parole revocation, is *not* a stage of a criminal prosecution . . ."

On the other hand, in *Parisi v. Davidson*, 405 U.S. 34 (1972) this Court explicity stated at p. 42 that:

> "(c)ourts-martial are . . . convened to adjudicate charges of *criminal* violations of military law . . ." (Emphasis added.)

The Manual for Court-Martial, 1969 (Rev.) treats summary court-martial specifically as a *criminal* proceeding, as likewise general and special courts-martial, in which must be applied the rules of evidence ". . . generally recognized in the trial of *criminal cases* in the United States District Courts or, when not inconsistent with those rules, at common law . . .". (Chapter XXVII, Par. 137) (Emphasis added.) Such rules do not call for "informality and flexibility" in summary courts-martial proceedings, as *Daigle* suggests. 490 F.2d at p. 365.

The Court of Military Appeals has repeatedly emphasized the criminal nature of summary court-

martial proceedings. See *United States v. Shamel*, supra. In *Alderman*, all three judges of the "Military Supreme Court" concurred in the view that summary courts-martial convictions are *criminal* convictions. Judge Quinn said: "Along with the general court-martial, [the summary and special] courts comprise the military criminal court system." 22 USCMA at p. 300. Judge Duncan, concurring and dissenting, stated that *Argersinger* applies to "criminal actions . . . within the system of military justice." Within that definition, he included summary courts-martial. *Id.* at p. 303. Judge Darden, dissenting, noted that summary courts-martial "constitute criminal convictions." *Id.* at p. 308, n. 1, See also *Manual for Courts Martial*, 1969 (Rev.) Paragraphs 8, 18(b)(1), 137.

In parole and probation hearings, the person in custody has been convicted and sentenced in a criminal proceeding long previous to the hearing on revocation. Guilt of crime there is *not* the issue. In summary courts-martial, on the contrary, the accused has *not* been convicted or sentenced previous to the current proceeding. The issue of his guilt of alleged criminal conduct has yet to be determined by due process of law. That is what characterizes summary courts-martial as "adversary, accusatory proceedings", whereas parole and probation revocation hearings are designed only to determine whether there has been a violation of conditions of parole or probation following a previous conviction and sentence in which due process was afforded.

The *Daigle* opinion apparently confuses summary courts-martial with "Article 15" proceedings. Congress specifically enacted Article 15 of the Uniform Code of

Military Justice to provide for *non-judicial* punishment. The Court of Military Appeals ruled in *United States v. Shamel*, supra, that in such proceedings the assistance of counsel is not required, as distinguished from its holding in *Alderman* that counsel is required in summary courts-martial where sentence may call for confinement.[1]

The distinction between "informal" Article 15 proceedings and summary courts-martial was clearly made by Congress in 1962, when it specifically amended Article 15 to "avoid staining military personnel's records with a *criminal* conviction." (Emphasis added). See Miller, *"A Long Look at Article 15"*, 28 Military Law Review 37 (1965), which cites on this point Senate Report No. 1911, Congressional Record, Vol. 108 (Part 6), p. 17346.

The fact that summary courts-martial are conducted with neither a jury nor a prosecutor other than the judge does not eliminate the due process requirement of assistance of counsel, as similarly it does not in civilian judicial proceedings on a charge of contempt of court. In this regard the language of Mr. Justice Holmes in *Gompers v. United States*, 233 U.S. 604, 610 (1914) is pertinent:

> "It does not follow that contempts of the class under consideration are not crimes . . . because trial

[1] In a letter dated January 11, 1973, former Secretary of Defense Melvin Laird directed secretaries of the Military Departments to revise their procedures for non-judicial punishment (Article 15) to require availability of legal advice to an accused prior to action by a commanding officer and opportunity to be accompanied at proceedings by a person who may speak for him or in his behalf.

by jury . . . has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

B. Consequences of summary courts-martial can be "grave".

The *Daigle* opinion deems the penalties which can be imposed by a summary court-martial as "quite restricted." 490 F.2d at p. 365. Judge Ely in the Order below (App. A, Appellants' Pet. for Cert., Case No. 74-175, p. 1a), contrarily expresses the "thought that if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, *facing much graver consequences*, should be entitled to the same consideration." (Emphasis added.)

The "graver consequences" of conviction by summary court-martial include (in addition to a potential combined sentence of one month confinement and forfeiture of two-thirds of one month's pay) an *automatic* reduction in pay grade to the lowest grade of E-1, except for those above grade E-4, who may be reduced only one pay grade. A drop of *three* pay grades is thus mandatory for those in pay grade E-4. Manual for Courts-Martial (1969), Chapter IV, Par. 16(b) and Chapter XXV, Par. 126(c)(3) and (e).

Further, prior summary courts-martial convictions may be used to enhance the penalties a serviceman may

receive for a later infraction. Manual for Courts-Martial (1969), Par. 127(c). Thus, a third conviction within four years for a petty offense which would otherwise entail a maximum penalty of imprisonment for three months can result in a "bad conduct discharge . . . forfeiture of all pay and allowances, and . . . confinement at hard labor for three months". This was the basis for the *Alderman* ruling which invalidated in subsequent sentencing any consideration of a prior summary court-martial conviction in which the accused had been sentenced to confinement without assistance of counsel.[2]

C. Military personnel are no better equipped than civilians to defend themselves at trial.

Finally, the *Daigle* opinion unrealistically makes the point that because "servicemen before summary courts-martial are adults, not juveniles", they would not "ordinarily have great difficulty presenting whatever defense or mitigating circumstances they might have.". 490 F.2d at p. 365.

Petitioners submit that there is no basis for attributing greater sophistication and legal skill to a military adult than to an indigent civilian adult in determining whether "the issues are of sufficient

---

[2]With regard to the "explosive quality" of conviction by summary court-martial, see Eugene R. Fidell, *The Summary Court-Martial: A Proposal*, 8 Harvard Journal on Legislation 571, 594-605 (1971).

complexity", whether he has a defense, whether there are mitigating circumstances, or whether "the assistance of counsel is necessary adequately to present the defense or mitigating circumstances". The point is well made by the Fifth Circuit in *Betonie*, 496 F.2d at p. 1008:

> "Appellants further argue that defendants in courts-martial do not need counsel because they are thoroughly versed in the applicable law by reason of their military training, and, in addition, that most offenses tried before courts-martial are purely military, and the applicable law is much less complex than civilian law. However, this court notes that there have been many disputes about the meaning of the various provisions of the Uniform Code of Military Justice, both procedurally and substantively, and that an accused confronted with this unique system of justice is likely to need counsel as much, if not more, than his civilian counterpart. The Navy presents other arguments in an attempt to distinguish military from civilian criminal justice, but we find all of these attempted distinctions unconvincing. The fact remains that an accused entering into a court-martial faces potentially serious punishments of the type which *Argersinger* holds may not be imposed unless the accused has the assistance of counsel. We thus conclude that both the Fifth and Sixth Amendments require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment."

Similarly, the Tenth Circuit said in *Kennedy v. Commandant*, supra, 377 F.2d at p. 343:

> "Certainly no one can deny that at least the spirit of the Sixth Amendment right to counsel pervades the due process requirements of military justice."

The holding in *Daigle* is directly contrary to that of the Court of Military Appeals in *Alderman* with regard to summary courts-martial. In deference to the expertise of that court in military matters, including the nature and function of summary courts-martial, this Court should bring the Ninth Circuit in conformity with the holding of "the Supreme Court of the Military" on this issue.

D. Due process requires that a judge not serve also as prosecutor.

One of the essentials of "fundamental fairness" is the impartiality of the trier of fact. As early as 1610, in *Dr. Bonham's Case*, 8 Co. Rep. 114(a), 77 Eng. Rep. 647, it was determined that "one cannot be Judge and attorney" simultaneously. Utilizing this very basic requirement of fairness, this Court, in *Tumey v. Ohio*, 273 U.S. 510 (1927) invalidated a state procedure under which magistrate's fees were contingent upon the conviction of the accused.

The *Tumey* decision was recently reaffirmed by this Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Therein, the mere possibility of the existence of "a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial", was held to "necessarily [involve] a lack of due process of law." 409 U.S. at p. 60. Due process demands that a "[P]etitioner [receive] a *neutral* and *detached judge* in the *first instance*." 409 U.S. at p. 62. (Emphasis added.)

The *Daigle* standard of due process, which sanctions a criminal proceeding in which the judge serves also as

prosecutor, and the accused, without a knowing and intelligent waiver, undergoes trial without the assistance of his own adversary counsel, surely must thus be found not to be due process at all. See *Betonie*, 496 F.2d at p. 1008.

E. District court opinion allows for military exigencies.

The *Daigle* opinion refers to situations in which "due to the exigencies of military operations, qualified counsel is not readily available" (470 F.2d at p. 365), acknowledging that no such difficulties were present in that case. The record here also shows no such fact situation, but it should be noted that the District Court's Memorandum Opinion in the instant case, 357 F.Supp. 495, 503, provided for such contingencies by "incorporating by reference" the holding of Chief Judge Pence in *Daigle v. Warner*, 348 F.Supp. 1074, 1080-81 (D.Haw. 1972) "that the type and quality of representation required under *Argersinger* must vary perforce with the context of each particular case."

See also Judge Quinn's opinion in *Alderman*, 22 USCMA at pp. 300-301, stating that "appointed counsel, under *Argersinger*, would not have to be a lawyer in the traditional sense".

F. Absolute right to counsel required under due process.

Gideon v. Wainwright, supra, overruled *Betts v. Brady*, 316 U.S. 455 (1942). In so doing this Court

negated the case-by-case due process rule of *Betts* and established that it no longer refers to "fundamental fairness" as the standard by which it determines whether an accused should be provided with counsel in a felony prosecution; this Court held that "an absolute right to appointment of counsel" applies in such case. *Mempa v. Rhay*, 389 U.S. at p. 134. *An Historical Argument for the Right to Counsel*, 73 Yale L.J. 1000, 1007 (1964). The *Gideon* rule for felony cases was made applicable by *Argersinger* to *all* criminal prosecutions which result in a sentence of confinement.

It seems clear, therefore, that the *Gideon* rationale for overruling *Betts* now also applies to all such *Argersinger*-type prosecutions. Yet the *Daigle* opinion erroneously reestablishes the defunct *Betts* case-by-case approach for summary courts-martial because they "are not felony trials". 490 F.2d at p. 366. That disregards this Court's mandate as to appointment of counsel on the basis of the Fifth Amendment's due process clause (aside from application of the Sixth Amendment) as enunciated by the combined rulings of *Gideon* and *Argersinger*.

The *Daigle* view fails to abide by this Court's holding in *Argersinger* that the constitutional right of counsel applies regardless of whether an offense is deemed a "felony" or "misdemeanor" or described as "serious" or "minor"; it seeks to revert to the distinction based on a prosecution being a "felony" trial.

III.

THE DISTRICT COURT'S JURISDICTION EXTENDED TO RESPONDENTS BEYOND ITS TERRITORIAL LIMITS UNDER THE MANDAMUS AND HABEAS CORPUS STATUTES AND COMPLIANCE WITH PROVISIONS OF 28 U.S.C. 1391(e).

A. Top military authorities are "custodians" for purposes of habeas corpus.

This Court held in *Minnesota v. Hitchcock*, 185 U.S. 373, 382 (1901) that because jurisdiction is a "preliminary question",

> "It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law".

See also *Ex parte Schollenberger*, 96 U.S. 369, 377 (1877); *Reid v. United States*, 211 U.S. 529, 539 (1908); *Mercelis v. Wilson*, 235 U.S. 579, 583 (1915); and *Industrial Addition Ass'n v. Co. . of Internal Revenue*, 323 U.S. 310, 313 (1945).

Accordingly, it is necessary to determine whether the district court in the instant case, even if its judgment and orders otherwise are affirmed by this Court, had appropriate jurisdiction to make them effective as against these respondents.

It is to be noted that the question of the district court's jurisdiction was raised by the Fifth Circuit in *Betonie*, 496 F.2d at p. 1005, and found to exist under the "general habeas corpus statute", but as that suit was not a class action, the appellate court could find

"no justification for the broad-based order of the district court establishing a procedural framework for *all* summary courts-martial". (496 F.2d at p. 1008, emphasis added.)

In *Daigle* and in the instant case, the respective district courts found jurisdiction for their judgments and orders under the provisions of both the mandamus statute (28 U.S.C. §1361) and the habeas corpus statute (28 U.S.C. §2241 et seq.). 348 F.Supp. at p. 1078 and 357 F.Supp. at p. 500. The Ninth Circuit *Daigle* panel did not refute the jurisdiction of the Hawaiian district court and in fact ordered it to conduct further habeas corpus proceedings as to one of the petitioners. 490 F.2d at p. 366.

In ordering vacated the orders and judgment of the district court, the Ninth Circuit panel in the instant case remanded the cause to the district court "for reconsideration in the light of *Daigle*". (App. A, Pet. for Cert. Case No. 74-175, p. 1a). However, on the question of jurisdiction, this case cannot properly be considered "in the light of *Daigle*" as the Hawaii and California district courts exercised their respective jurisdictions at different levels, so that the issue of jurisdiction in the two cases is *not* the same.

The district court in *Daigle* limited the scope of its judgment and order to its own territorial jurisdiction, as did the district court in *Betonie*. It may be assumed therefore that the "custodians" of petitioners for habeas corpus purposes in both *Daigle* and *Betonie*, whether the latter were named petitioners or members of a petitioner class, were those named respondents who resided in the respective jurisdictions of the Hawaii and Florida district courts. For that reason there was

no basis for raising the question in either of those cases whether the top Navy and Marine Corps authorities residing in Washington, D.C. may properly be treated as "custodian" for purposes of habeas corpus jurisdiction.

That question *has* been raised, however, in the instant case. Here the district court held that ". . . this Court's jurisdiction extends beyond this district in terms of the effect this ruling must have upon military personnel in the Navy and Marine Corps and in the custody of Warner, Zumwalt and Cushman". 357 F.Supp. at pp. 500-501. (The latter, all residents of Washington, D.C. were then respectively Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps.) Further, that court held at p. 502 that ". . . Respondents-Defendants Warner, Zumwalt, and Cushman are the *custodians* of the class herein described for the purpose of the writ of habeas corpus". (Emphasis added.)

Respondents contended below that the district court was without jurisdiction to extend the scope of its judgment and orders beyond the territorial limits of the Central District of California.

Petitioners maintain that the district court correctly established the basis of its jurisdiction to extend the scope of its judgment and orders beyond the territorial boundaries of the Central District of California, *both* for purposes of mandamus and issuance of a writ of habeas corpus by virtue of the provisions of 28 U.S.C. §1391(e). 357 F.Supp. at pp. 500-502.

In further support of the position of that court that the top officials of a military authority are custodians of all military personnel under their command for the purpose of habeas corpus jurisdiction, and that such

officials need not be physically within the district court's territorial limits for said jurisdictional purposes; the Ninth Circuit case of *Smith v. Campbell*, 450 F.2d 829 (1971) is pertinent.

In *Smith*, petitioner and his custodian, his immediate commanding officer, were within the territorial jurisdiction of the California district court at the time the petition for writ of habeas corpus was filed. Prior to court action, petitioner was involuntarily removed to Australia. His new immediate commanding officer in Australia was not within the California court's territorial jurisdiction, but the petition had named as respondents the Secretary of Defense, the Secretary of the Navy, and the Chief of Naval Personnel. The Ninth Circuit held that the latter top officials in Washington, D.C. were "those having present custody of the petitioner" and that they "are subject to the process of the court". (450 F.2d at p. 834.) That Court said at p. 833:

> "Generally, a 'superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him'. *Williams v. Fanning* 332 U.S. 490, 493, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947). In *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955), the Court stressed the requirement that in this area the courts give effect to practical considerations rather than formalistic and technical concepts. Furthermore, habeas corpus 'is not now and never has been a static, narrow, formalistic remedy'. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)."

With regard to obtaining jurisdiction over the Washington officials, the Court stated further in *Smith*, 450 F.2d at pp. 833-834:

> "In order to obtain jurisdiction over indispensable federal officials who are outside the territorial jurisdiction of the district court, the court may utilize the provisions of 28 U.S.C. §1391(e), which provides that process may be served by certified mail beyond the territorial limits of the district. In *Schlanger v. Seamans*, 401 U.S. 487 (1971) n. 4 at 490, 91 S.Ct. 995, the Court held that the extraterritorial service of process provisions of §1391(e) could not be used to create jurisdiction when it did not exist at the time of the filing of the action. However, the Court did not suggest that once jurisdiction to consider the merits of a habeas corpus petition is first properly established, §1391(e) could not be used to join indispensable parties."

The latter quotation from *Smith* was cited with approval by Judge Wright of the Ninth Circuit in *Miller v. Laird*, 464 F.2d 533, 534 (1972).

The holding of *Smith* applies to the instant case in that the named petitioners conferred jurisdiction on the District Court over their immediate commanding officers in California by personal service. 357 F.Supp. at p. 501. They also named as respondents the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, and served them with process in Washington, D.C. under the provisions of §1391(e). 357 F.Supp. at p. 501. The court's jurisdiction having been established by personal service on the immediate commanding officers who were within the court's territorial jurisdiction, §1391(e)

could properly be used to join as "indispensable parties" the Washington officials as custodians of the members of petitioners' class. The district court properly so held them to be.

Holding that the phrase "civil actions" in §1391(e) "should be read to include habeas corpus actions", on the basis of the Supreme Court's statement in *Harris v. Nelson*, 394 U.S. 286, 293 (1969) that "It is, of course, true that habeas corpus proceedings are characterized as 'civil' ". the court in *United States ex rel Armstrong v. Wheeler*, 321 F.Supp. 471 (E.D.Pa. 1970), presented an illuminating Footnote No. 8 at p. 477:

> "We have neither found in our research nor have been referred to any cases other than *Switkes* which even discuss the relation between 'civil action' as it is used in section 1391 and habeas corpus. The *Harris* case dealt with the interpretation of Federal Rule of Civil Procedure 81(a)(2) as it related to the application of Rule 33 discovery in habeas corpus proceedings.
>
> "It would appear that Congress seemed to be most concerned with mandamus proceedings when it passed Sections 1361 and 1391 together in 1962, cf. S. Rep. No. 1992, 87th Cong. 2d Sess. (1962). However, this concern was motivated by the more emcompassing purpose to remove procedural obstacles to suits against centralized governmental officials. Id. Since the custodian in habeas corpus actions is almost always within the same district as the petitioner, it is logical that the Congress would not directly consider such actions when addressing itself to the problem of such procedural obstacles. To rule that habeas corpus did not come within the scope of this statute *would solidify procedural obstacles to suits against central administrators, which obstacles Congress had clearly indicated were undesirable.*" (Emphasis added)

The Second Circuit also holds that "Since habeas corpus proceedings are civil in nature, they are subsumed under the phrase 'any civil action' ". *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (1970), Footnote No. 9, p. 1183, which cites *Webb v. Beto*, 362 F.2d 105 (*5th* Cir. 1966).

It is significant to note that the Navy in *Smith*, 450 F.2d at p. 834, contended that the top military officials in Washington, D.C. *could properly be deemed the "custodians"* of petitioner in Australia if only he would file a new petition in the District of Columbia. They cited *Eisentrager v. Forrestal*, 174 F.2d 961 (1949). See Footnote No. 1, 450 F.2d at p. 834, which points out that in this Court it is still an open question whether a "custodian" for purposes of habeas corpus may be an official who has "directive power over the immediate jailer". See also 357 F.Supp. at p. 501, with reference to *Strait v. Laird*, 406 U.S. 341 (1972), and p. 502, with reference to *Burns v. Wilson*, 346 U.S. 844 (1953).

This court implicitly may have answered that question in the affirmative in *Braden v. Circuit Court*, 410 U.S. 484 (1973), 93 S.Ct. 1123, 1131 (1973), where the opinion of Mr. Justice Frankfurter in *Burns v. Wilson*, 346 U.S. 844, 851-852, is cited. Affirmation of the district court's judgment and orders in the instant case on the basis of jurisdiction grounded not only in mandamus but also in habeas corpus will confirm that view.

CONCLUSION

The order of the appellate court vacating the judgment and orders of the district court should be vacated, and judgment rendered affirming the judgment and orders of the district court.

December 2, 1974.

Respectfully submitted,

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403
A.L. WIRIN and FRED OKRAND
A.C.L.U. Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005

Attorneys for Petitioner

Of Counsel:
DAVID F. ADDLESTONE

APPENDIX A

Manual for Courts-Martial, 1969 (Rev.) – Chapter XIV

79. SUMMARY COURTS-MARTIAL. ***a. Function.*** The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form.

The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, the court will refer the matter to the convening authority. See 33*d*.

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to

consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment which may be adjudged upon conviction; and

That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the

allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See 70*b*(3).

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish

grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accussed full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c;* app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b*(2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5176

DANIEL EDWARD HENRY, *et al.*, etc.,

Petitioners,

v.

HONORABLE J. WILLIAM MIDDENDORF, II, etc., *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1974, a copy of Brief for Petitioners was airmailed, postage prepaid, to Hon. Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Counsel for the Respondents. I further certify that all parties required to be served have been served.

NATHAN R. ZAHM
4422 Sherman Oaks Circle
Sherman Oaks, California 91403

Counsel for Petitioners

Supreme Court, U. S.
FILED
DEC 12 1974
MICHAEL RODAK, JR., CLERK

Nos. 74-175 and 74-5176

In the Supreme Court of the United States

OCTOBER TERM, 1974

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

REAR ADM. MERLIN H. STARING,
Judge Advocate General,
REAR ADM. H. B. ROBERTSON, JR.,
Deputy Judge Advocate General,
COL. MAX G. HALLIDAY,
Assistant Judge Advocate General (Military Law),
COMDR. LAWRENCE M. FARRELL,
LT. ROBERT H. WELLEN,
Attorneys,
Judge Advocate General's Corps,
United States Navy,
Washington, D.C. 20370.

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
HARRIET S. SHAPIRO,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
HARVEY M. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes and regulations involved	2
Questions presented	3
Statement	3
Introduction and summary of argument	8
Argument	11
I. There is no right to counsel in summary courts-martial	11
A. The congressional plan does not contemplate the right to counsel	11
B. The congressional judgment in prescribing the methods for imposing punishment in the armed forces is entitled to particular deference	20
C. The Sixth Amendment does not require that defense counsel be appointed in summary courts-martial	27
D. The Due Process Clause of the Fifth Amendment does not require that defense counsel be appointed in summary courts-martial	35
II. Consent to trial by summary courts-martial constitutes a valid waiver of the right to counsel	43

Argument—Continued Page

III. Even if defense counsel must be appointed at summary courts-martial, such a requirement should not be applied retroactively 49

Conclusion 59

Appendix 1a

CITATIONS

Cases:

Adams v. *Illinois*, 405 U.S. 278 ..... 51, 53, 55
Argersinger v. *Hamlin*, 407 U.S. 25 ..... *passim*
Arsenault v. *Massachusetts*, 393 U.S. 5 52-53
Berry v. *City of Cincinnati*, 414 U.S. 29 ..... 52, 54-55
Betonie v. *Sizemore*, 496 F.2d 1001 ..... 8, 9, 27
Brady v. *United States*, 397 U.S. 742 ..... 48, 49
Burgett v. *Texas*, 389 U.S. 109 55
Burns v. *Wilson*, 346 U.S. 137 ..... 22, 25, 34
Chaffin v. *Stynchcombe*, 412 U.S. 17 48
Cohens v. *Virginia*, 6 Wheat. 264 30
Coleman v. *Alabama*, 399 U.S. 1 53
Colten v. *Kentucky*, 407 U.S. 104 47
Cooley v. *Board of Wardens*, 12 How. 299 30
Daigle v. *Warner*, 490 F.2d 358 ..... *passim*
Desist v. *United States*, 394 U.S. 244 ..... 51, 52
DeStefano v. *Woods*, 392 U.S. 631 ..... 51, 54
Douglas v. *California*, 372 U.S. 353 52
Dynes v. *Hoover*, 20 How. 65 21
Figueroa Ruiz v. *Delgado*, 359 F.2d 178 42
Furman v. *Georgia*, 408 U.S. 238 58
Gagnon v. *Scarpelli*, 411 U.S. 778 ..... *passim*
Gideon v. *Wainright*, 372 U.S. 335 31

Cases—Continued	Page
Goldberg v. *Kelly*, 397 U.S. 254	36, 43
Gosa v. *Mayden*, 413 U.S. 665	51, 52, 55
Gault, In re, 387 U.S. 1	36, 43
Grimley, In re, 137 U.S. 147	16
Home Bldg. & L. Assn. v. *Blaisdell*, 290 U.S. 398	38
Johnson v. *New Jersey*, 384 U.S. 719	51
Johnson v. *Zerbst*, 304 U.S. 458	31, 44
Kitchens v. *Smith*, 401 U.S. 847	55
Landman v. *Carlson*, 463 F.2d 218, certiorari denied, 410 U.S. 985	50
Loper v. *Beto*, 405 U.S. 473	55
Linkletter v. *Walker*, 381 U.S. 618	51
Marston v. *Oliver*, 324 F. Supp. 691, reversed on other grounds, 485 F.2d 705	39
Martin v. *Hunter's Lessee*, 1 Wheat. 304	30
McGautha v. *California*, 402 U.S. 183	48
McKeiver v. *Pennsylvania*, 403 U.S. 523	
McMann v. *Richardson*, 397 U.S. 759	48
Michigan v. *Payne*, 412 U.S. 47	51, 52, 54
Morrissey v. *Brewer*, 408 U.S. at 471	*passim*
Myers v. *United States*, 272 U.S. 52	30
North Carolina v. *Alford*, 400 U.S. 25	47, 49
O'Callahan v. *Parker*, 395 U.S. 258	18
Parker v. *Levy*, No. 73-206, decided June 19, 1974	*passim*
Parker v. *North Carolina*, 397 U.S. 790	48
Patton v. *United States*, 281 U.S. 276	31
Powell v. *Alabama*, 287 U.S. 45	31
Quinn, Ex parte, 317 U.S. 1	21
Reid v. *Covert*, 354 U.S. 1	18
Robinson v. *Neil*, 409 U.S. 505	57, 58
Santobello v. *New York*, 404 U.S. 257	47
Simmons v. *United States*, 390 U.S. 377	16

Cases—Continued Page

St. Pierre v. *United States*, 319 U.S. 41 ... 55
State v. *Paxton*, 201 Kan. 353, 440 P.2d 650 ... 40
Stovall v. *Denno*, 388 U.S. 293 ... 51, 53
Tehan v. *Shott*, 382 U.S. 406 ... 51
Toth v. *Quarles*, 350 U.S. 11 ... 18
United States v. *Alderman*, 22 U.S.C. M.A. 298 ... 8, 25, 26, 27, 34, 35, 56, 57
United States v. *Jackson*, 390 U.S. 570 ... 48, 49
United States v. *Tucker*, 404 U.S. 443 ... 52, 53, 55
Williams v. *United States*, 401 U.S. 646 ... 51, 54
Wolff v. *McDonnell*, No. 73-679, decided June 26, 1974 ... *passim*
Yakus v. *United States*, 321 U.S. 414 ... 38

Constitution and statutes: Page

United States Constitution:

Bill of Rights ... 28, 30
First Amendment ... 21
Fifth Amendment ... *passim*
Sixth Amendment ... *passim*

Act of March 2, 1799, 1 Stat. 709 ... 30
Act of April 23, 1800, 2 Stat. 46 ... 30
Act of July 17, 1862, Article X, 12 Stat. 603 ... 30
Articles of War, Article 69, 2 Stat. 367-368 ... 29
Military Justice Act of 1968, 82 Stat. 1335 ... 22
Uniform Code of Military Justice, as amended, 10 U.S.C. 801-940:

Article 15, 10 U.S.C. 815 ... 11, 12, 17, 19, 23, 26

Constitution and statutes—Continued — Page

Article 15(a), 10 U.S.C. 815(a) ... 19
Article 16, 10 U.S.C. 816 ... 2, 11, 1a
Article 16(3), 10 U.S.C. 816(3) ... 13
Article 18, 10 U.S.C. 818 ... 11
Article 19, 10 U.S.C. 819 ... 11
Article 20, 10 U.S.C. 820 ... 8, 13, 44, 2a
Article 24, 10 U.S.C. 824 ... 2a
Article 25, 10 U.S.C. 825 ... 11
Article 27, 10 U.S.C. 827 ... 45
Article 27(a), 10 U.S.C. 827(a) ... 8
Article 27(b), 10 U.S.C. 827(b) ... 11
Article 27(c), 10 U.S.C. 827(c) ... 11
Article 31, 10 U.S.C. 831 ... 16
Article 36, 10 U.S.C. 836 ... 12
Article 38, 10 U.S.C. 838 ... 45
Article 38(b), 10 U.S.C. 838(b) ... 11
Article 60, 10 U.S.C. 860 ... 14, 16
Article 64, 10 U.S.C. 864 ... 14, 16
Article 65(c), 10 U.S.C. 865(c) ... 14
Article 69, 10 U.S.C. 869 ... 14, 15, 56
Article 76, 10 U.S.C. 876 ... 5
Article 86, 10 U.S.C. 886 ... 4
Article 91, 10 U.S.C. 891 ... 4
Article 92, 10 U.S.C. 892 ... 4
Article 113, 10 U.S.C. 913 ... 4
Article 134, 10 U.S.C. 934 ... 4
Article 137, 10 U.S.C. 937 ... 44, 56

Miscellaneous:

Air Force Military Guide AF Man. 111-1, ¶ 3-6c of July 2, 1973 ... 16
Air Force Regulations 125-35 ... 12
Army Regulations 190-1, par. 5 ... 40

Miscellaneous—Continued Page

Committee Print, *Constitutional Rights of Military Personnel, Summary-Report of Hearings by Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (February 20-21, March 1, 2, 6, 9 and 12, 1962) 23
DeHart, *Observations on Military Law and the Constitution and Practice of Courts-Martial* (1862) 29
Dept. Army Msg. P 101203Z of July 10, 1972 ..... 16, 35
Department of the Army Pamphlet 27-4 12
Department of the Navy Corrections Manual, SECNAV Instruction 1640.9, June, 1972: 12
Par. 107(3) 40
Par. 1009 40
Fidell, *The Summary Court-Martial: A Proposal*, 8 Harv. J. Leg. 571 (1971) 23
H. Rep. No. 1831, 60th Cong., 2d Sess. 25
Manual for Courts-Martial, United States 1969 (Rev. ed.): 2, 12, 43, 3a-10a
Par. 16 ..... 2, 3a
Par. 16(b) 13, 3a-4a
Par. 75*b*(2) 56
Par. 79 ..... 2, 19, 5a
Par. 79*a* 12, 13, 53, 5a
Par. 79*b* 14, 53, 5a
Par. 79*d* 13, 14, 44, 6a-9a
Par. 127*c* 46

Miscellaneous—Continued

Page

Manual of the Judge Advocate General:
Sec. 0101a(7) 12
Sec. 0120d 14

Military Justice Handbook Guide for Summary Court-Martial Trial Procedure, Department of the Army Pamphlet No. 27-7 (February 9, 1973) 45

Sec. Navy Msg. 082237Z/52 of June 8, 1973 16

S. Rep. No. 743, 60th Cong., 2d Sess. 25

S. Rep. No. 486, 81st Cong., 1st Sess. 22

S. Rep. No. 1601, 90th Cong., 2d Sess. 23

The Navy Guidebook, *Summary Court-Martial Trial Guide*, Naval Justice School 45

Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958) 29

Winthrop, *Military Law and Precedents* (1920 ed.) 24, 29

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-175

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

No. 74-5176

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The court of appeals rendered no opinion. Its order (Pet. App. 1a-2a)[1] is reported at 493 F.2d 1231. The

[1] "Pet. App." designates the appendix to the government's petition for a writ of certiorari (No. 74-175).

opinion of the district court (Pet. App. 4a-19a) is reported at 357 F. Supp. 495.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 27, 1974, and on May 23, 1974, the court denied a petition for rehearing and rejected a suggestion for rehearing *en banc* (Pet. App. 3a). On June 21, 1974, Mr. Justice Douglas extended the time for filing the government's petition for a writ of certiorari to and including August 24, 1974. The petition for a writ of certiorari in No. 74-5176 was filed by the servicemen ("plaintiffs") on August 20, 1974, and the government's petition for a writ of certiorari in No. 74-175 was filed on August 24, 1974. Both petitions were granted on October 21, 1974.[2] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Articles 16, 20, and 24 of the Uniform Code of Military Justice, 10 U.S.C. 816, 820, and 824, and paragraphs 16 and 79 of the *Manual for Courts-Martial, United States*, 1969 (Revised Edition), are set forth in the appendix to this brief, *infra*, pp. 1a-10a.

---

[2] The parties have agreed that the federal parties will file an opening brief, discussing the issues raised in both petitions. The plaintiffs have reserved their right also to file an opening brief. Either party may file a reply brief.

QUESTIONS PRESENTED

1. Whether the Fifth or Sixth Amendment require that the military service must provide counsel to an accused in a summary court-martial, and, if so, under what circumstances.

2. Whether any such requirement should be given retroactive effect.[3]

STATEMENT

1. In February, 1973, plaintiffs—then enlisted members of the United States Marine Corps stationed at the Marine Corps Air Station, El Toro, Santa Ana, California—brought this class action in the United States District Court for the Central District of California challenging the authority of the military to try them at summary courts-martial without providing them with counsel. All plaintiffs had been charged with relatively minor offenses in violation of the Uniform Code of Military Justice ("UCMJ"). Five of the plaintiffs, including two who later intervened in the case, had been convicted by summary

---

[3] Plaintiffs' petition also presents the question whether a district court may, by writ of *mandamus* or *habeas corpus*, extend the scope of its judgment beyond the territorial limits of its district (Pet. No. 74-5176, p. 2). This question was not considered by the court of appeals, and need not now be addressed by this Court, cf. *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op. 27. In any event, the question has no practical significance in the current posture of this case, since this Court's decision will be binding on the Navy, wherever summary courts-martial are conducted. Therefore, we have not discussed this question further in this brief.

courts-martial and sentenced, *inter alia*, to short periods of confinement at hard labor.[4] Three other plaintiffs (and numerous intervenors) had been ordered to stand trial at summary courts-martial which had not yet convened.[5] In accordance with procedures applicable when plaintiffs sought relief in the district court, those who were tried and convicted had not been provided representation by counsel at their summary courts-martial, and those who were awaiting trial had been informed that counsel would not be provided.[6]

---

[4] Plaintiffs Henry, Kirby, Bray, and Ness were charged with unauthorized absence, in violation of Article 86, UCMJ (10 U.S.C. 886). Plaintiff McLean was charged under a number of specifications alleging unauthorized absence and failure to go to an appointed place of duty, in violation of Article 86; disobedience of a superior commissioned officer, in violation of Article 91 (10 U.S.C. 891); assault on a superior noncommissioned officer, as well as disrespect to that officer and disobedience of his orders, in violation of Article 92 (10 U.S.C. 892); and misbehavior as a sentry on post, in violation of Article 113 (10 U.S.C. 913). Plaintiff Ness was sentenced to confinement at hard labor for 27 days; the others were sentenced to confinement at hard labor for 30 days. On review, plaintiff McLean's sentence was reduced to confinement at hard labor for 20 days.

[5] Plaintiffs Haecker and Mims were charged with unauthorized absence. Plaintiff Mims was also charged with making several unauthorized, long-distance telephone calls, in violation of Article 134 (10 U.S.C. 934), and disobeying an order of a superior noncommissioned officer, in violation of Article 92 (10 U.S.C. 892). Plaintiff Jackson was charged with assault, in violation of Article 134. The intervenors were charged with various similar infractions.

[6] We submit that no federal civilian court has ever acquired jurisdiction over the claims of those plaintiffs who

Alleging in their petition and complaint to the district court that they, and all others similarly situated, had been and were being denied their constitutional right to the assistance of counsel at summary courts-martial, plaintiffs sought, *inter alia*, the following relief: (1) permission to proceed as a class action, on behalf of all members of the Navy and Marine Corps who had been, were, or would be subject to trial by summary court-martial without having been advised of their right to the assistance of counsel;[7] (2) writs of *habeas corpus* to release plaintiffs who were in confinement; (3) an injunction against future confinement resulting from summary courts-martial in which accused were not given the opportunity to be represented by counsel, together with declaratory and mandatory relief; and (4) an order vacating the court-martial convictions of those plaintiffs who had been convicted and restoring all rights lost as a result thereof.

2. In its Memorandum Opinion (Pet. App. 4a), the district court concluded that in light of *Argersinger* v. *Hamlin*, 407 U.S. 25—in which this

---

at the time this action was brought were still awaiting trial by summary court-martial. As we argued in our Supplemental Brief in *Secretary of the Navy* v. *Avrech*, No. 72-1713, the legislative history of Article 76 (10 U.S.C. 876) shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus* seeking release from custody. We have sent copies of that brief to counsel for plaintiffs.

[7] In this brief, references to the Navy include the Marine Corps, except where otherwise indicated.

Court held that the Sixth Amendment prohibits imprisonment for misdemeanors or petty offenses unless the accused has been represented by counsel or has waived that right—accused servicemen at summary courts-martial resulting in confinement must be provided the opportunity to be represented by counsel. In its judgment (Pet. App. 20a), the court granted substantially all the requested relief, including the release of those plaintiffs who were confined and an injunction prohibiting the Navy from conducting summary courts-martial resulting in confinement, unless the accused were advised of their rights under *Argersinger* and unless, in the absence of waiver, they were provided counsel both prior to and during the court-martial proceedings. The court of appeals stayed this judgment pending disposition of the appeal (Pet. App. 24a), and this Court denied plaintiffs' application to vacate the stay (Pet. App. 25a).

3. While this case was on appeal, the Ninth Circuit decided *Daigle* v. *Warner*, 490 F.2d 358 (Pet. App. 26a).* There, the court ruled (with Trask, J., dissenting) that this Court's holding in *Argersinger* did not apply to summary courts-martial, but that the Due Process Clause of the Fifth Amendment did require counsel to be made available to accused at summary courts-martial under some circumstances.

---

* A petition for a writ of certiorari has been filed in that case by the accused servicemen, who assert that, absent military exigencies, the Sixth Amendment requires the armed services to provide counsel to an accused in any sum-

Adopting the due process standards for revoking probation set forth in *Gagnon* v. *Scarpelli*, 411 U.S. 778, with special reference to military exigencies, the court of appeals held (Pet. App. 39a-40a):

> [C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced.

"Under the compulsion" of the *Daigle* opinion, the Ninth Circuit in the instant case vacated the orders and judgment of the district court and remanded the cause for reconsideration in the light of *Daigle* (Pet. App. 1a). Plaintiffs' petition for rehearing and suggestion for rehearing *en banc* were denied (Pet. App. 3a).

---

mary court-martial resulting in imprisonment. *Crosby, et al.* v. *Warner*, No. 73-6642, petition for a writ of certiorari pending. In our responding memorandum we acquiesced in that petition for certiorari, but noted that, since the issue there is the same as one of those raised by the petitions in the instant case, separate plenary review may not be warranted in that case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress did not provide a right to the assistance of counsel in summary courts-martial: Compare Article 20, 10 U.S.C. 820, with Article 27(a), 10 U.S.C. 827(a). See *United States* v. *Alderman*, 22 U.S.C.M.A. 298; *Betonie* v. *Sizemore*, 496 F.2d 1001, 1006 (C.A. 5); *Daigle* v. *Warner*, 490 F.2d 358. The intended function of the summary court-martial was to provide a means for expeditiously imposing moderate penalties for conduct which violates military obligations, but is not serious enough to warrant a full-scale court-martial. In determining the balance to be struck between procedural protections for an accused and the needs of military discipline, Congress concluded that the summary court-martial should not be a strictly adversary proceeding; there was to be no prosecutor, nor was the defense entitled to counsel. Rather, the trial was to be administered by an impartial summary court-martial officer, responsible for safeguarding the interests of both the government and the accused.

But after this Court held in *Argersinger* v. *Hamlin*, 407 U.S. 25, that the Sixth Amendment forbids any imposition of confinement for misdemeanors or petty offenses unless a civilian accused is afforded the opportunity to be represented by counsel, two appellate courts held that there was a similar constitutional right to defense counsel in summary courts-martial. *United States* v. *Alderman*, *supra* (Darden,

J., dissenting); *Betonie* v. *Sizemore*, *supra*. The Ninth Circuit, in *Daigle* v. *Warner*, *supra* (Pet. App. 26a), and this case, took a somewhat different approach. It correctly recognized that the Sixth Amendment was not intended to apply to trials before courts-martial, and refused to extend this Court's conclusion concerning the civilian trial in *Argersinger* to the military (Pet. App. 34a-37a). But it held that there is a limited Fifth Amendment right to the assistance of counsel at summary courts-martial, relying in substantial part on this Court's conclusion in *Gagnon* v. *Scarpelli*, 411 U.S. 778, that such a right exists in probation revocation hearings (Pet. App. 37a-40a). Cf. *Wolff* v. *McDonnell*, No. 73-679, decided June 26, 1974.

We believe that these appellate courts erred in extending this Court's conclusions concerning constitutional standards for civilian proceedings to the significantly different military tribunals involved here. The summary court-martial is an important part of the detailed plan devised by Congress to administer military justice, and the introduction of appointed counsel into these summary proceedings would be inconsistent with that plan. Congressional judgments concerning military requirements are entitled to particular deference; military necessity permits procedures which might be constitutionally invalid in civilian society.

In any event, the rationales of this Court's decisions in *Argersinger* and *Scarpelli* do not apply to summary court-martial proceedings, which are, in

significant respects, unlike the proceedings involved in those cases. In particular, there is substantial historical precedent for concluding that the Sixth Amendment right to counsel does not apply to summary courts-martial, which adequately protect the rights of the accused in relatively informal, non-adversarial proceedings. Applying the balancing of interests test appropriate to due process determinations under the Fifth Amendment, the summary court procedures prescribed by Congress satisfy both the government's need for expeditious, yet fair procedures, and the accused's need for adequate safeguards.

Even if the accused has a right to counsel in military disciplinary procedures, his knowing and voluntary consent to trial by a summary court-martial constitutes a valid waiver of that right. If he wishes to assert his right to counsel, he may always reject a summary court-martial and exercise his right to trial by a special or general court-martial, at which counsel will be provided.

Finally, we submit that under this Court's decisions, any determination that the military must provide counsel in summary courts-martial should be prospective only, since the impact of a retroactive ruling would disrupt long settled decisions without countervailing significant benefits to the servicemen involved.

ARGUMENT

I. There Is No Right to Counsel in Summary Courts-Martial.

A. *The congressional plan does not contemplate the right to counsel.*

The Uniform Code of Military Justice provides four mechanisms for disposing of cases involving offenses committed by servicemen: the general, special, and summary courts-martial, and disciplinary punishment administered by the commanding officer pursuant to Article 15, 10 U.S.C. 815. General and special courts-martial are complete judicial proceedings, nearly always presided over by lawyer judges with lawyer counsel for both the prosecution and the defense.[9] General courts-martial may award any lawful sentence, including death (Art. 18, 10 U.S.C. 818). Special courts-martial may award a bad conduct discharge, six months' confinement at hard labor, and forfeiture of two-thirds pay for six months (Art. 19, 10 U.S.C. 819). Article 15 punishment,

---

[9] These features are mandatory for general courts-martial. Special courts-martial may be, but seldom are, convened without a military judge; in such cases, the senior member of the court presides. Appointed defense counsel at special courts-martial is required to be an attorney, unless an attorney cannot be obtained because of physical conditions or military exigencies. In addition to the appointed counsel at general and special courts-martial, the accused may retain civilian counsel at his own expense, or he may be represented by a military lawyer of his own selection, if such lawyer is "reasonably available". Articles 16, 25, 27(b), 27(c), 38(b) (10 U.S.C. 816, 825, 827(b), 827(c), 838(b)).

conducted personally by the accused's commanding officer, is an administrative method of dealing with the most minor offenses. *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op. 15.[10]

The summary court-martial occupies a position between informal nonjudicial punishment under Article 15 and the full courtroom procedure of the general and special courts-martial. Its purpose, as stated in Paragraph 79*a* of the *Manual for Courts-Martial, United States* 1969 (Rev. ed.),[11] "is to exercise justice promptly for relatively minor offenses under a simple form of procedure." (App., *infra*, 5a). Like its early predecessors, the Army summary court and the Navy deck court, see note 25, *infra*), the summary court-martial is a one-officer court which

---

[10] The maximum punishments which may be imposed under Article 15 are: 30 days' correctional custody; 60 days' restriction to specified limits; 45 days' extra duties; forfeiture of one half pay for two months; detention of one half pay for three months; reduction by one pay grade. Enlisted members attached to or embarked on a vessel may be sentenced to three days' confinement on bread and water or diminished rations (Art. 15, 10 U.S.C. 815; *Manual of the Judge Advocate General*, Sec. 0101a(7)). Correctional custody is not the same as confinement. It is intended to be served in a way which allows normal performance of duty, together with intensive counseling. Persons serving correctional custody, however, are confined when necessary. *Department of the Navy Corrections Manual*, SECNAV Instruction 1640.9, Chapter 7, June, 1972; Department of the Army Pamphlet 27-4; Air Force Regulations 125-35.

[11] Article 36 of the UCMJ (10 U.S.C. 836) authorizes the President to prescribe regulations implementing the Code's provisions. These regulations appear in *Manual for Courts-Martial, United States* 1969 (Rev. ed.) ("*Manual*").

tries enlisted persons for offenses involving violations of military duty or purely military standards of conduct. See note 31, *infra*. Because the offenses brought before summary courts-martial are minor and the procedures are simplified, these courts may impose only relatively low levels of punishment. The maximum sentences are: 30 days' confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month (Art. 20, 10 U.S.C. 820 (App., *infra*, 2a)).[12]

Article 16(3) of the UCMJ, 10 U.S.C. 816(3), provides that a summary court-martial consists of one commissioned officer (App., *infra*, 1a). Paragraph 79*a* of the *Manual* describes his basic role: "The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded." (App., *infra*, 5a). Under Paragraph 79*d* of the *Manual* he is required before trial to advise the accused of his rights, including his right to remain silent and to refuse summary court-martial (App., *infra*, 6a).[13] He is further re-

---

[12] Paragraph 16*b* of the *Manual* further provides that a summary court-martial may not sentence any accused of a pay grade higher than E-4 to confinement, hard labor without confinement, or to reduction of more than one pay grade (App., *infra*, 3a-4a).

[13] If the accused desires more elaborate procedure, he may refuse to accept the summary court-martial. In such a case, the charges must either be dismissed or referred to a special or general court-martial—where the accused is entitled to

quired to inform the accused of the charges and, if there is a guilty plea, to ascertain that it is voluntary. He has the power to subpoena witnesses and is responsible for conducting a full trial of the charges, in accordance with formal rules of evidence. *Manual*, 79*b*, *d*. (App., *infra*, 5a, 7a-9a).

During the presentation of evidence, the summary court-martial officer must examine prosecution witnesses, permit the accused to cross-examine and even aid in cross-examination. He is also required to obtain defense witnesses and help the accused elicit defense evidence.[14] If the accused is convicted, the summary court-martial officer must advise him of his right to present evidence in extenuation and mitigation, including his right to make a sworn or unsworn statement. *Manual*, 79*d* (App., *infra*, 8a-9a). Finally, Navy summary court-martial officers must summarize the evidence on all contested charges and the evidence submitted by the accused in extenuation and mitigation. *Manual of the Judge Advocate General*, Sec. 0120d.[15]

---

representation by counsel and complete courtroom procedure. Article 20, 10 U.S.C. 820 (App., *infra*, 2a).

[14] The services have permitted the few servicemen who wish to retain private counsel for summary court-martial proceedings to do so. Since this practice is infrequent, it does not significantly interfere with the summary nature of the proceedings, nor does it raise substantial equal protection questions.

[15] The UCMJ provides for a three-step review process of summary court-martial convictions. See Articles 60, 64, 65 (c), and 69 (10 U.S.C. 860, 864, 865(c), and 869). First, every record is reviewed by the officer who convened the

Thus, summary courts-martial provide an expeditious but fair method of dealing with minor offenses. Such a procedure is essential to the military, and its functions would be significantly undermined by requiring defense counsel in any substantial numbers of such proceedings.[16]

---

court and then by an officer supervisory to him. This supervisory review includes review of the case by a lawyer, the staff judge advocate of the supervisory authority. Statistics maintained by the Office of the Judge Advocate General of the Navy indicate that in 1973, more than 30 percent of the Navy summary court-martial convictions or sentences were modified to the benefit of the accused as a result of this review process. Beyond this automatic review, the accused may petition the Judge Advocate General for relief "on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to [his] substantial rights." Art. 69 (10 U.S.C. 869).

[16] This is true regardless of whether the right to counsel is based on the Sixth Amendment, by extension of *Argersinger, supra*, and thus applies whenever confinement may be adjudged, or on the Fifth Amendment, by a modification of the test in *Gagnon* v. *Scarpelli, supra*, which requires consideration of the particular facts of each individual case. The Sixth Amendment standard, since it turns simply on the possibility of confinement, is easier to apply, but that same simplicity countenances no exceptions and thus severely limits effective discipline in precisely those situations where such discipline may be most necessary—on ships at sea or in isolated outposts. The Ninth Circuit's Fifth Amendment standard, in contrast, requires consideration of the complexity of claimed defenses and mitigating circumstances as provided in *Gagnon* v. *Scarpelli, supra*, but permits the military to proceed without providing qualified defense counsel, where, due to military exigencies, none is reasonably available, provided the rights of the accused are not unduly prejudiced. *Daigle* v. *Warner, supra* (Pet. App. 39A-40A).

Although this standard is apparently intended to avoid

Prompt, informal methods of imposing discipline are particularly important to the military. In *Parker* v. *Levy*, *supra* (slip op. at 14-16), this Court analyzed the difference between the role of military justice in military society and civilian criminal justice in civilian society. The military, it noted (*id.* at 16), "'is an executive arm' whose 'law is that of obedience'" (citing *In re Grimley*, 137 U.S. 147, 153). The military, moreover, is a distinct cohesive com-

---

the deleterious effects of preventing effective discipline under adverse conditions, its very flexibility may make it impossible for the military to administer. The commanding officer appoints defense counsel when he convenes the summary court. Sec. Navy Msg. 082237Z/52 of June 8, 1973; Dept. Army Msg. P 101203Z of July 10, 1972; *Air Force Military Justice Guide AF Man.* 111-1 ¶ 3-6c of July 2, 1973. In order to determine, under the Ninth Circuit's rule, whether there is a constitutional right to counsel, the commanding officer, a non-lawyer, would have to analyze and evaluate the facts of each case in advance of trial, and attempt to determine whether the charges or mitigating factors raised issues of such complexity that counsel was necessary, or, if the court-martial proceeded without counsel because of military exigencies, whether the accused would be unduly prejudiced. The necessity of making these pre-trial judgments might well conflict with the commanding officer's post-trial role in reviewing the court-martial record, as required by Articles 60 and 64 (10 U.S.C. 860 and 864). It is also possible that the requirement that the accused make a showing of necessity in order to obtain appointed counsel would conflict with his right to remain silent under the Fifth Amendment and Article 31 (10 U.S.C. 831). See *Simmons* v. *United States*, 390 U.S. 377.

In any event, the flexibility of the Ninth Circuit's approach may be more apparent than real; counsel would probably be appointed in most cases because of the commanding officer's inability to predict before trial whether, on review of the summary court record, the reviewing authority will conclude that an uncounseled conviction was invalid.

munity, where the government's role is uniquely pervasive. For servicemen, the "[g]overnment is often employer, landlord, provisioner, and law giver rolled into one" (*Parker* v. *Levy*, *supra*, slip op. at 16). Accordingly, the Uniform Code of Military Justice is highly prominent in the lives of military personnel. In *Levy*, this Court observed (slip op. at 14):

> That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.

Like Article 15 punishment proceedings, which the Court described in *Levy* (slip op. at 15), summary courts-martial address themselves primarily to conduct which violates the UCMJ but would not violate civilian criminal codes.[17]

The summary court-martial, then, is a uniquely military institution, designed primarily to enforce uniquely military standards of conduct. Obviously, the government has a strong interest in the effective enforcement of these standards upon military personnel. Military service demands more than passive

---

[17] See note 31, *infra*. None of the offenses by the named plaintiffs in this case, except perhaps the assault by plaintiff Jackson, would be punishable under civilian codes.

compliance with rules; it requires affirmative effort on the part of each individual in the performance of his duties. As a result, if the military services are to perform their function, affirmative control over the conduct of military personnel is essential.

This control over conduct must be exercised in a prompt, nontechnical manner, both to promote understanding of applicable standards among service members and to allow primary energies to be devoted to operational matters rather than administrative proceedings. As the Court stated in *Toth* v. *Quarles*, 350 U.S. 11, 17: "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." Indeed, because of this special organizational mission, "[c]ourt-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order" (*id.* at 22). See also *Reid* v. *Covert*, 354 U.S. 1, 39; *O'Callahan* v. *Parker*, 395 U.S. 258, 261, 265; *Parker* v. *Levy*, *supra*, slip op. at 14-16.

Quite apart from the government's interest in prompt dispositions, which is disserved by the participation of defense counsel,[18] there are compelling reasons for allowing summary courts-martial to operate under the relative informality of the one-officer

---

[18] Counsel have been provided in Navy summary courts-martial since June 8, 1973. The average duration of summary court proceedings (from the preferral of charges through final review) in the first six months of 1973 was 33.69 days; in the last six months of that year it was 41.60 days; see note 26, *infra*.

court in which there are no opposing counsel pitted against each other in elaborate adversary contests. The summary court-martial has certain elements of formality (*Manual*, 79; App., *infra*, 5a-10a), but is less formal than the special court-martial with its lawyers, military judge, military panel (in some cases) and all the accoutrements of the courtroom.

The summary court-martial, as contemplated by Congress, consists only of the accused and the court officer.[19] Typically, the proceedings take place in a conference room. This atmosphere of relative privacy and informality encourages frank communication on both sides. It frees the court officer from a purely judicial role, and permits him to educate the accused regarding his military obligations.[20] The accused can discuss with the court officer the difficulties which may have led to his infraction—an opportunity for objective communication which might cause an accused to reject a proffered Article 15 hearing, and instead subject himself to a summary court-martial.[21]

---

[19] And, of course, any necessary witnesses must be present.

[20] Indeed, the summary court officer epitomizes the "employer, landlord, provisioner and law giver" relationship between the accused and his military government.

[21] A serviceman subject to Article 15 punishment who, for whatever reason, prefers not to have his commanding officer consider his case in the first instance, may refuse Article 15 punishment (Article 15(a), 10 U.S.C. 815(a)). In such a case, the commanding officer selects an alternative procedure, usually a summary court-martial. The rejection of Article 15 punishment does not expose the accused to a substantial increase in punishment by the summary court-martial. See pp. 12-13, *supra*.

B. *The congressional judgment in prescribing the methods for imposing punishment in the armed forces is entitled to particular deference.*

The fact that there is a right to counsel in certain civilian criminal proceedings does not mean that the same right exists in the military. As the Court recently stated in *Parker* v. *Levy*, *supra*, slip op. at 8-9:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). * * * [W]e [have] noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *." *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).
>
> * * * *
>
> Just as military society has been a society apart from civilian society, so "[m]ilitary law * * * is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns* v. *Wilson*, *supra*, 346 U.S., at 140.

See also *Dynes* v. *Hoover*, 20 How. 65; *Ex parte Quirin*, 317 U.S. 1, 39. Because of these differences between military and civilian society, "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker* v. *Levy*, *supra*, slip op. at 21. Accordingly, because of the unique character of military society, many constitutional protections apply to servicemen in different degree. In *Parker* v. *Levy*, for example, this Court held that First Amendment principles relating to civilian life must be applied differently in the military context, and that the proper standard of review for a vagueness challenge to the UCMJ, even with respect to statutes impinging on the First Amendment, is that which applies to civil criminal statutes regulating economic affairs.

Similarly, we submit that the standard which applies to statutes affecting the right to counsel in civilian adversary proceedings cannot be mechanically applied to UCMJ provisions governing summary court-martial procedure. The UCMJ represents a painstaking plan by Congress to administer justice fairly and to maintain discipline effectively in the armed forces. The decision to make the summary court-martial a non-adversarial trial, presided over by an officer required to assist the accused in his defense, is entitled to great deference as a carefully considered congressional judgment aimed at provid-

ing an expeditious but fair disciplinary procedure for relatively minor offenses. As the Court stated in *Burns* v. *Wilson*, 346 U.S. 137, 140, "* * * the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

The legislative history of the current UCMJ provisions for summary court-martial shows that, despite certain objections to use of the summary procedure, Congress decided to retain such a court because it serves an important disciplinary function. Following testimony prior to enactment of the UCMJ that summary courts should be abolished, Congress struck a balance by providing that if an accused objected to trial by a summary court, either the charges would be dismissed or he would be entitled to trial by special or general court-martial (in either court-martial he would be represented by counsel). S. Rep. No. 486, 81st Cong., 1st Sess. 13. In the 1968 amendments to the Code, Congress extended the accused's right to counsel to special, as well as general, courts-martial. Military Justice Act of 1968, 82 Stat. 1335.

Significantly, no proposal appears in the history of this Act to extend the right to counsel to accused at summary courts-martial. There were proposals to eliminate the summary court-martial altogether, but

they were rejected.[22] Instead, the right to refuse summary court-martial was extended to include those who had already refused Article 15 punishment for the same offense. This amendment was a compromise between those favoring retention of the summary court-martial and those who would abolish it.[23] The Senate Armed Services Committee emphasized the importance of summary courts-martial, noting that they are still used "in many thousands of cases." S. Rep. No. 1601, 90th Cong., 2d Sess. 6.[24]

---

[22] *E.g.*, Committee Print, *Constitutional Rights of Military Personnel, Summary—Report of Hearings by Subcommittee on Constitutional Rights of Senate Committee on the Judiciary*, 88th Cong., 1st Sess., 34-36 (February 20-21, March 1, 2, 6, 9 and 12, 1962).

[23] S. Rep. No. 1601, 90th Cong., 2d Sess.; see also Fidell, *The Summary Court-Martial: A Proposal*, 8 Harv. J. Leg. 571, 573 (1971).

[24] The practical importance of the summary court-martial is suggested by the following statistics furnished us by the Offices of the Judge Advocates General, of the Navy and the Army, showing the frequency with which that procedure has been used during the past 10 years:

Numbers of Summary Courts-Martial Per Year

Year*	Army	Navy
1964	17,290	10,785
1965	15,480	11,052
1966	14,656	11,934
1967	11,186	13,355
1968	12,648	12,290
1969	14,705	13,078
1970	15,540	13,309
1971	14,740	14,097
1972	9,322	11,308
1973	6,434	11,322

* The yearly figures are statistically not quite comparable. The Army statistics refer to calendar years, whereas the

Thus, as recently as 1968, Congress has reaffirmed its legislative judgment, continuous since the creation of the field officer's court in 1862,[*] that a one-officer

---

Navy and Marine Corps statistics refer to fiscal (July 1—June 30) years.

[*] The earliest ancestor of the present summary court-martial was the "field officer's court," created for the Army in 1862, to compensate for the Army commander's lack of disciplinary authority. See Winthrop, *Military Law and Precedents*, 49[6]–498 (1920 ed.) ("Winthrop"). Unlike the other inferior courts-martial existing at that time—the regimental court and the garrison court—the field officer's court was composed of a single officer who had been designated from his regiment to conduct such trials. The field officer's court was empowered to award the same punishment as the other inferior courts-martial of its time: imprisonment or hard labor for one month and forfeiture of one month's pay. The major restriction in the field officer's court was that it operated only in time of war. If any officer had been detailed to serve as a field officer's court in time of war, however, regimental and garrison courts could not be convened. Other than the general court-martial, the jurisdiction of the field officer's court was exclusive.

In 1890, Congress provided for another Army one officer court, the "summary court," which could be convened in time of peace to deal with minor offenses in a speedy manner. The statute creating this court required enlisted men charged with minor offenses to be brought before the summary court-martial within twenty-four hours from the time of arrest. Like the field officer's court in time of war, the summary court in time of peace supplanted the garrison and regimental courts. The only exception was that the accused could prevent the determination of his case by the summary court by demanding a trial by court-martial. The summary court at first possessed the same punishment power as did the field officer's court. Later, it was permitted to impose up to three months' confinement and three months' loss

court-martial, without prosecutor or defense counsel, is necessary to provide speedy, yet fair disposition of minor military infractions. The judiciary should be highly reluctant "to override the congressional determination that counsel before summary courts would introduce time-consuming or cumbersome procedures counteracting the objective of swift reaction to minor offenses." *United States* v. *Alderman*, *supra*, 22 U.S.C.M.A. at 308-309 (Darden, J., dissenting); *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

Available statistics confirm that, in practical effect, application of the judicial requirement of counsel to summary courts-martial has so diminished the usefulness of these courts that they no longer play the role in the military justice system for which they were designed by Congress.

---

of pay H. Rep. No. 1831, 60th Cong., 2d Sess. 2. See Winthrop, *supra*, at 493-497.

In 1909, Congress, impressed by the efficiency with which the Army one-officer courts performed, authorized a one-officer court for the Navy. S. Rep. No. 743, 60th Cong., 2d Sess. 1. This new "deck court" replaced the Navy "summary court-martial" (a three officer tribunal which differed substantially from the Army's one-officer summary court) in cases "which demand greater punishment than may be imposed by the commanding officer." H. Rep. No. 1831, *supra*, at 2. The punishment power of the deck court was comparable to, but slightly less than, that of the Navy summary court-martial: 30 days' solitary confinement, either on regular rations or bread and water; 30 days' confinement; reduction to the next inferior rating; deprivation of foreign shore liberty; or extra duties. Thirty days' loss of pay was also authorized. As in the Army summary court, the accused could refuse deck court and demand a full court-martial.

The number of summary courts-martial by the Army declined suddenly in mid-1972, with the application of the *Argersinger* ruling to those proceedings. In 1971, 14,740 summary courts-martial were conducted by the Army; in 1972, the number dropped to 9,322 and in 1973 to 6,434 (see note 24, *supra*). There was no similar drop in Article 15 proceedings or special courts-martial. A similar result has occurred in the Navy, which has been required to provide appointed counsel in summary courts-martial following the ruling by the Court of Military Appeals in *Alderman*.[26] Significantly, although the rate of acquittals did not change appreciably during the half-year period following *Alderman*, the frequency of summary courts-martial declined more than twenty-two percent, while the average time required to complete a summary court-martial increased nearly twenty-five percent. These trends have continued

---

[26] Counsel has been required at Navy summary courts-martial adjudging confinement since June 8, 1973. (See note 16, *supra*). Statistics maintained in the Office of the Judge Advocate General of the Navy are summarized in the following table:

	Jan 1—June 30, 1973	Jul 1—Dec. 31, 1973	Jan. —June 30, 1974
Total Summary Courts-Martial	5,659	4,389	4,380
Convictions	5,381	4,163	4,095
Acquittals	278	226	285
Percentage of Acquittals	4.9	5.1	6.5
Average number of days from preferral of charges through final review	33.69	41.60	45.13

through the first half of 1974. During this period, the number of Article 15 proceedings and of special courts-martial has risen significantly.

In effect, then, judicial modification of the summary court-martial procedures has thwarted the congressional objective of providing, in the summary court-martial, a means for prompt and effective punishment for minor infractions, without any apparent countervailing benefit to the accused servicemen.

C. *The Sixth Amendment does not require that defense counsel be appointed in summary courts-martial.*

Those courts that have held that a right to counsel at summary courts-martial derives from the Sixth Amendment have relied on *Argersinger* v. *Hamlin*, 407 U.S. 25, in which this Court held that a defendant may not be sentenced to imprisonment as the result of a criminal prosecution in which he was denied the assistance of counsel. *E.g.*, *Betonie* v. *Sizemore*, 496 F.2d 1001 (C.A. 5); *United States* v. *Alderman*, 22 U.S.C.M.A. 298. *Argersinger*, of course, involved a civilian prosecution—and nowhere does the opinion suggest that the stated rule applies to military trials.

The holding in *Argersinger* was based on this Court's determinations first, that there is no historical support for limiting the right to assistance of counsel to serious criminal cases involving more than six months' confinement, and second, that the assistance of counsel is requisite to a fair trial. We submit that both of these considerations—the intent of the

Framers and related notions of fairness—refute the existence of a right to counsel at summary courts-martial.

1. As the Ninth Circuit correctly stated in *Daigle* v. *Warner*, *supra* (Pet. App. 35a), "[t]here is little textual or historical support * * * for the conclusion that the framers of the Bill of Rights intended the Sixth Amendment right to counsel to apply to trials before courts-martial." Traditional court-martial and military disciplinary practices, particularly those prevailing at the time the Bill of Rights was adopted and shortly thereafter, indicate that only a severely limited right to counsel existed. "Certainly there was no right to have personal, adversary counsel of the sort required in state and federal courts by *Argersinger*." *Daigle* v. *Warner*, *supra* (Pet. App. 36a-37a). See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 49 (1958) ("Wiener").

None of the early versions of either the Articles of War, governing the Army, or of the Articles for the Government of the Navy provided for personal defense counsel for the accused. The 1786 version of the Articles of War was the first to make any provision for defense of the accused, and this defense was to be provided by the prosecuting officer:

> The judge advocate * * * shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner,

> the answer to which might tend to incriminate himself * * *.[27]

The same language appears in Article 69 of the 1806 revision of the Articles of War, 2 Stat. 367-368.

Lack of statutory authorization notwithstanding, personal defense counsel were admitted to courts-martial, but in a restricted capacity. Winthrop (*supra*, at 166) characterizes the traditional position of counsel in courts-martial as "embarrassing if not indeed humilitating," and he goes on to describe the particular restrictions under which counsel operated: "* * * they were precluded from all *oral* comunication, not being permitted to examine witnesses *viva voce*, or to address the court by statement, motion, or argument, but being required to express themselves either through the accused or in writing." [28] The fact

---

[27] Article 6, 1786 Articles of War, reprinted in Winthrop, *supra*, at 972-973.

Wiener, *supra*, at 22, comments on this provision for defense conducted by the prosecutor: "Plainly, the foregoing reflects the Blackstonian, common-law notion of the judge as counsel for the prisoner [footnote, citing 4 Blackstone, *Commentaries* 355-356] rather than the sixth amendment's guarantee of the assistance of counsel." The role of the judge advocate is discussed in Winthrop, *supra*, at 179-204.

[28] See Wiener, *supra*, at 23-49; DeHart, *Observations on Military Law and the Constitution and Practice of Courts-Martial*, 122 and 162 (1862), stated:

> The counsel for the prisoner (*amicus curiae*) has a seat near the prisoner, and instructs him what questions to ask, which are written upon slips of paper, and handed by the prisoner to the judge advocate. Whatever points may arise in the course of the trial, on which remarks or arguments are deemed necessary by the

that this early, restrictive court-martial practice continued after the ratification of the Bill of Rights and long into the nineteenth century strongly suggests that the framers of the Constitution never contemplated that the right to counsel applied in courts-martial. See *Myers* v. *United States*, 272 U.S. 52, 175; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Cohens* v. *Virginia*, 6 Wheat. 264, 420; *Cooley* v. *Board of Wardens*, 12 How. 299, 315.

With regard to disciplinary punishment for minor offenses, early practice again shows that military law developed procedures designed to enforce discipline without intervention of counsel. For example, Article I of the Rules for the Regulation of the Navy, passed by the Continental Congress in 1775, authorized commanders of ships to impose disciplinary punishment, including confinement. It was not until the revision of the Articles in 1862 that the imposition of such punishments was controlled by limiting regulations.[29]

---

counsel, must be referred to in that way in writing, as this person is not permitted at any time to address the court during its proceedings. * * *

* * * *

Lawyers, technically as such, are not recognized by courts-martial, though permitted to appear as a friend, to assist the prisoner with advice in the conduct of his defence; and therefore it is, that interruptions by nice distinctions or pleadings, orally, are not permitted. Such pleadings, too, would be entirely out of place, and tend to no good result, but on the contrary would embarrass by delays the business of the court.

[29] See Act of March 2, 1799, 1 Stat. 709; Act of April 23, 1800, 2 Stat. 46; Article X of the 1862 Articles for the Government of the Navy, Act of July 17, 1862, 12 Stat. 603.

When subject to such punishment, the accused had no right to be represented by counsel.

In short, the eighteenth and early nineteenth century practices for imposing punishment in the military, whether for the most minor or the most major offenses, did not include a right to defense counsel in any meaningful sense. Accordingly, by contrast to the civilian prosecution involved in *Argersinger*, there is ample historical support for excluding counsel from summary courts-martial.

2. The rationale of *Argersinger* underlying its conclusion that the assistance of counsel is necessary for a fair trial derives primarily from the fact that in civilian prosecutions the accused faces a trained prosecutor. But since there is no prosecutor in the summary court-martial, there is no need to balance the skills of opposing parties.

This Court has frequently stated that in possibly complicated legal proceedings it is unfair to pit a lay accused against a public prosecutor. *Gideon* v. *Wainwright*, 372 U.S. 335; *Powell* v. *Alabama*, 287 U.S. 45, 68-69; *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463; see *Patton* v. *United States*, 281 U.S. 276, 308; cf. *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 789. There is no such problem in summary court-martial proceedings. Serving in place of both prosecutor and defense counsel, the summary court officer is required to protect, impartially, the interests of both parties. He is instructed to help the accused develop his evidence and present his case—a requirement which substantially diminishes the likelihood

that an accused without adversary counsel would be unable to deal with complex issues.[30] Moreover, all charges brought before a summary court-martial are petty, and the vast majority of cases involve simple military offenses which the accused can understand on the basis of even brief military experience. Cf. *Parker* v. *Levy*, *supra*. For example, more than half the offenses tried by summary courts-martial in the

[30] Mr. Justice Powell, concurring in *Argersinger*, suggested the fairness of such procedures in pointing out that "[a]n unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts" (407 U.S. at 46). He also noted that, in many instances, a defendant can obtain a fair trial in state misdemeanor courts when the procedures are informal, presided over by lay judges, and the prosecution is not vigorous. 407 U.S. at 50.

Navy in 1973 involved some form of absence from duty.[31]

Argersinger also reflects this Court's concern that the volume of misdemeanor cases may create "an obsession for speedy dispositions, regardless of the fairness of the result." 407 U.S. at 34. Summary court-martial procedures do not pose a similar danger. While swift reaction to minor offenses and avoidance of technical and drawn-out adversarial disputes is a legitimate military goal, the sheer volume of cases is not so great as in civilian courts.

Summary courts do not have the overcrowded dockets and overworked officials typical of civilian mis-

[31] Numbers of Specifications under Different Articles of the UCMJ, Tried to Navy Summary Courts-Martial 1973

Article	Offense	Number
85-87	Desertion, unauthorized absence, missing movement	7825
89-92	Disrespect, disobedience	3170
	Other military offenses	1722
121	Larceny	409
128	Assault	391
92/134	Drug offenses	937
	Other nonmilitary offenses	332
	Total Military Offenses	12,717
	Total Nonmilitary Offenses	2,069
	Total Offenses	14,786

(Statistics supplied by the Office of the Judge Advocate General, Department of the Navy.)

demeanor courts. Instead, summary court-martial officers are generally appointed on a case-by-case basis; they do not have the problem of administering a continuous inflow of new cases on a docket. As a result, they have time to consider each case individually and to conduct a dignified, orderly proceeding.[32]

Finally, as discussed *infra*, pp. 39-40, the effects of the confinement imposed as a result of a summary court-martial are significantly less severe than the possibilities faced by a defendant in a civilian criminal prosecution.

3. The Court of Military Appeals concluded, in *United States* v. *Alderman*, 22 U.S.C.M.A. 298, that this Court's ruling in *Argersinger* should be extended to require counsel at summary courts-martial. For the reasons outlined above, we believe this was an incorrect interpretation of *Argersinger*. Normally, the civilian courts should accord substantial weight to a decision of the Court of Military Appeals, since it is an agency with expertise in problems of military justice. *Burns* v. *Wilson*, *supra*. But in the majority opinion in *Alderman*, it did not exercise its special expertise. Instead, it automatically applied *Argersinger* without considering the special circumstances of the military, relying simply on the fact that a summary court martial conviction may result in confinement. A concurring opinion (by Duncan, J.) stated that *Argersinger* applies to summary courts "unless

---

[32] Moreover, the accused at summary court-martial need deal only with one man, not with a complex bureaucracy of clerks, prosecutors and judges. See *supra*, pp. 13, 14, 19.

there is demonstrated a military necessity demanding nonapplicability * * *." 22 U.S.C.M.A. at 303.[33] But, as Chief Judge Darden noted in dissent (22 U.S.C.M.A. at 308-309), the evaluation of military necessity in these circumstances is for the Congress, not the courts (see pp. 20-27, *supra*).

D. *The Due Process Clause of the Fifth Amendment does not require that defense counsel be appointed in summary courts-martial*

While correctly holding that the Sixth Amendment does not provide the right to appointed counsel in summary courts-martial, the court of appeals, relying on its decision in *Daigle* v. *Warner*, *supra* (Pet. App. 26a), held that the Due Process Clause of the Fifth Amendment does require counsel at summary courts-martial when such assistance is necessary in

---

[33] Judge Duncan believed that the lack of any military necessity for conducting summary courts without adversary counsel was demonstrated by the fact that the Army and the Air Force currently provide such counsel. But the Air Force does not need to conduct prompt disciplinary proceedings when counsel is not available, as on ships at sea or in isolated posts in war time; in fact, the Air Force conducts summary courts-martial only infrequently—less than 100 times a year—and when it does, counsel has been routinely provided since before *Argersinger*. The Army, in contrast, began providing counsel in summary courts where confinement was a possibility only in July 1972, in reaction to uncertainty over the scope of *Argersinger*. Dept. Army Msg. P 101203Z of July 10, 1972, *supra*, n. 16. The effects of this alteration of summary court-martial procedures since mid-1972 has not been as significant for the Army as it would be for the Navy which, even in peace time, has large numbers of enlisted men isolated for extended periods of time on ships at sea.

order to present the accused's case effectively. In defining these circumstances, the court held (Pet. App. 39a-40a) that the due process standards for revoking probation set forth in *Gagnon* v. *Scarpelli* also apply to summary courts-martial:

> [C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced.

The court of appeals erred in mechanically applying the *Scarpelli* requirements to the unique context of summary courts-martial.

In recent years the Court has examined the due process right to counsel in proceedings which are not criminal prosecutions but in which the accused has a substantial interest at stake. *E.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254; *In re Gault*, 387 U.S. 1; *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. 778. In *Wolff* v. *McDonnell*, No. 73-679, decided June 26, 1974, holding that there is no general right to counsel at prison disciplinary proceedings resulting in either

loss of good time or disciplinary confinement,[34] this Court reiterated the balancing of interests test which is necessary in due process inquiries (slip op. at 18-19):

> We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers* v. *McElroy*, 367 U.S., at 895, "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.*, at 895; *Morrissey* [v. *Brewer*], 408 U.S. at 471.

Thus, although a serviceman retains his right to due process as guaranteed by the Fifth Amendment, that fact "in no way implies that this right is not subject to restrictions imposed by the nature of the regime" to which he is lawfully subject. *Wolff* v. *McDonnell*, *supra*, slip op. at 15 (citing *Parker* v. *Levy*, *supra*).[35]

---

[34] The only right to counsel the Court found necessary to due process in *Wolff* was that illiterate inmates with complex cases be permitted to seek the aid of either another inmate or a staff member (slip op. at 29).

[35] Although the differences between the military and the prison environment are clearly more significant than their similarities, both are insulated societies, with close and continuous daily contacts among their members and between superior and subordinate. To that extent, the functions of military discipline are more similar to prison disciplinary

In striking the balance demanded by the Due Process Clause, the governmental interests militating against the imposition of the procedural requirement at issue must always be carefully considered, but where statutes regulating the armed forces are concerned, congressional judgments concerning these interests are entitled to particular deference. See pp. 20-27, *supra*. Indeed, the extent of this alteration in the normal standard for due process evaluations is indicated by the holding in *Parker* v. *Levy*, *supra* (slip op. at 22) that, because of the unique needs of military society, the proper standard of review for a due process challenge to the Uniform Code of Military Justice is that which applies to criminal statutes regulating economic affairs.[36]

In light of these considerations, the court below should not have applied the *Scarpelli* standards to summary courts-martial. The summary court-martial is a disciplinary device designed for a discretely contained community. Because of its unique needs, that community must be governed by highly restrictive rules of behavior enforced in a manner which will

---

proceedings (cf. *Wolff* v. *McDonnell*) than to probation revocation proceedings. See *Morrissey* v. *Brewer*, 408 U.S. 471, 483. This quality of the military regime, as well as the unique mission of the armed forces, necessarily shapes the procedures by which military justice is enforced.

[36] Accordingly, the court below should simply have considered whether the military has a legitimate interest in maintaining summary courts-martial in the form intended by Congress. Cf. *Yakus* v. *United States*, 321 U.S. 414; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U.S. 398.

not merely deter undesirable conduct, but also will inculcate positive values. See *Parker* v. *Levy*, *supra*. One cannot automatically apply to such an environment the procedural guidelines established for civilians in an open society, or for parolees or probationers under only very limited restraints. *Wolff* v. *McDonnell*, *supra*, slip op. at 19. These general considerations are especially persuasive with regard to the right-to-counsel issue in this case.

1. In assessing the competing concerns at stake here, we note first that the possible adverse effects of a summary court-martial on the individual are significantly less severe than the consequences of the parole or probation revocations considered in *Morrissey* and *Scarpelli*. In those cases, the individuals involved were facing substantial periods of reincarceration.[37] *Morrissey*, *supra*, 408 U.S. at 482. The collateral effects could be severe, since "[a]ny incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family." *Marston* v. *Oliver*, 324 F. Supp. 691, 696 (E.D. Va.), reversed on other grounds, 485 F.2d 705 (C.A. 4).

The accused at a summary court-martial, on the other hand, faces a maximum of 30 days' confine-

[37] Even in *Wolff* v. *McDonnell*, the period of prison "good time" lost as a result of disciplinary action (though the prisoner could not immediately feel its effects) could be substantial.

ment.[38] Since the maximum forfeiture which a summary court-martial may adjudge is two-thirds of one month's pay, he continues to accrue some pay even during his term of confinement. Upon his release he is assured of employment, since the general goal of the military corrections system is to restore confinees to duty "better prepared to perform useful, offense-free service." *Department of the Navy Corrections Manual*, par. 107(3), *supra*, n. 10, see also Army Reg. 190-1, par. 5.

In sum, a serviceman serving a brief confinement following a summary court-martial conviction, though his sentence may be to him a matter of major concern, does not suffer deprivations as grave as those confronting a defendant in a civilian criminal case, or even a parolee or probationer.[39]

2. The government's interest in maintaining the relatively informal, efficient, and non-adversarial character of the summary court-martial procedure is greater than the government interests at stake in the civilian procedures involved in *Morrissey* and *Scar-*

---

[38] Moreover, current regulations award prisoners five days "good conduct time" for each month. *Department of the Navy Corrections Manual*, par. 1009, *supra*, n. 10.

[39] The record of a court-martial conviction may not have the same continuing adverse effect as the record of a civilian conviction. Civilian authorities often ignore court-martial convictions—particularly those which, like most summary court convictions, involve military offenses. For example, it has been held that court-martial convictions for purely military offenses may not be considered for purposes of a state habitual offender statute. *State* v. *Paxton*, 201 Kan. 353, 364-365, 440 P.2d 650, 659-660.

pelli. As this Court observed in *Wolff* v. *McDonnell* (slip op. at 20), "the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, * * * at least no more so than in the case of the ordinary criminal trial." In the closely contained and specialized military environment, on the other hand, important institutional goals are advanced by the use of the summary court-martial in the form intended by Congress, which recognized the special need served by that court as an expeditious but fair method of dealing with minor offenses.

The extreme importance to the military of unquestioning obedience, the necessity for the development of positive attitudes and standards of conduct, and the strong interest in the fast return of convicted servicemen to their operational functions are all substantial considerations weighing against the conversion of the summary court-martial into a more adversarial and therefore formal and time consuming proceeding. See pp. 16-19, *supra.* Cf. *Wolff* v. *McDonnell, supra,* slip op. at 28.

3. A final consideration which should be weighed here in striking the balance demanded by the Due Process Clause is one that is directly related to the interests of both the government and the accused—the basic fairness of the fact-finding process of the summary court-martial. The summary court-martial officer is directed to be impartial and to safeguard the interests of both sides (pp. 13-14, *supra*). He is also required to help the accused assemble facts and

develop his position. Consequently, the accused stands on an equal footing with the charging authority. Cf. *Argersinger* v. *Hamlin*, *supra*, 407 U.S. at 46, 50 (Powell, J., concurring).[40]

These factors differentiate the summary court-martial not only from civilian prosecutions in which a lay accused is opposed by a trained prosecutor (see pp. 31-32, *supra*), but also from certain administrative proceedings in which this Court has noted that the desired balance has not been struck. As this Court observed in *Gagnon* v. *Scarpelli*, the accused in a parole (or probation) proceeding is represented by a parole (or probation) officer who may actually have a prosecutorial orientation (411 U.S. at 785):

> [A]n executive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification and attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

---

[40] Since there is no prosecutor in summary courts-martial, the presence there of defense counsel would overturn this balance and create a procedure that would unduly favor the defendant. The summary court officer might attempt to compensate for this imbalance by adopting a more prosecutorial role, which would subvert his function as impartial judge, advisor and educator. In that event, the presence of defense counsel could actually damage the interest of the accused. Cf. *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (C.A. 1); *Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 787-788.

See, similarly, *In re Gault*, 387 U.S. 1; *Goldberg* v. *Kelly*, 397 U.S. 254; *Morrissey* v. *Brewer*, 408 U.S. 471.

The objectivity of the summary court-martial officer, however, has not been compromised by any prior involvement in decisions adverse to the accused. He has no ongoing interest in the outcome of the case. Typically, prior to the convening of the court, he is not even acquainted with the accused. He can therefore fairly protect the interests of both parties, as the *Manual* requires him to do.

A proper balancing of these considerations, we submit, indicates that the summary court-martial procedure designed by Congress satisfies due process; it provides for expeditious but just discipline for minor military offenses. In enacting the provisions of the UCMJ, Congress has been engaged in a careful and ongoing development of procedures which are fair to the accused yet consistent with the unique demands of the armed forces. The summary court-martial, which is an integral component of the military justice system, ought not to be rigidly circumscribed by requirements found to be constitutional necessities in other contexts, but which distort the congressional purpose.

II. Consent to Trial by Summary Court-Martial Constitutes a Valid Waiver of the Right to Counsel.

An accused waives his right to counsel at a trial by court-martial by voluntarily consenting to trial

by summary court, in which counsel is not provided, instead of demanding trial by special or general court, at which counsel is available. Cf. *Argersinger* v. *Hamlin*, 407 U.S. 25, 37; *Johnson* v. *Zerbst*, 304 U.S. 458, 468.

Article 20 (10 U.S.C. 820) provides, in pertinent part, that "[n]o person with respect to whom summary court-martial have [sic] jurisdiction may be brought to trial before a summary court-martial if he objects thereto." Paragraph 79*d*(1) of the *Manual* requires the court officer to advise the accused of his right to object to trial by summary court-martial, and to ask him whether he consents or objects to such a trial. It requires him further to give the accused a reasonable time to consider the question, an opportunity which allows the accused to consult with others (including counsel) prior to a decision. If the accused does not consent, the summary court notifies the convening authority (usually the accused's commanding officer), who may either dismiss the charges or refer them to another court—typically a special court-martial. (App., *infra*, 6a-7a).

In deciding whether to consent to a summary court-martial, the accused will be generally acquainted with the military justice system as a result of his training.[41] See *Parker* v. *Levy*, *supra*, slip op. at 17. In

[41] Article 137 (10 U.S.C. 937) requires that certain Articles of the Code "be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter" and that these Articles "be explained again after he has completed six months of active duty, and again at the time when he reinlists." Among the Ar-

addition, his summary court officer must explain the options to him carefully. The Army and Navy have promulgated guidebooks which direct how this is to be done. The Army guidebook, for example, requires summary court officers to explain that if the accused objects to summary court-martial, the convening authority may decide to refer his case to a special or general court-martial for trial and that either of these courts is empowered to impose longer terms of confinement than summary courts can impose.[42] The Army guidebook also requires the following explanation:

> If your case is referred to special court-martial you will have the opportunity to be defended by qualified legal counsel, if obtainable, provided at no cost to you. If your case is referred to general court-martial you will be provided qualified legal counsel at no cost to you.[43]

Finally, the accused must be given an opportunity to consult with counsel concerning the consequences of consent or objection to summary court-martial.[44]

---

ticles that must be explained are Articles 27 and 38 (10 U.S.C. 827 and 838), which set forth the right to counsel.

[42] *Military Justice Handbook Guide for Summary Court-Martial Trial Procedure*, Department of the Army Pamphlet No. 27-7, February 9, 1973, pp. 3-3 to 3-5.

[43] *Id.* at 3-4. At the time of the courts martial here involved, the accused was also told that he would not be represented by appointed counsel if tried by summary court-martial. Pet. App. 5A.

[44] *Id.* at 3-4 to 3-5. The Navy Guidebook, *Summary Court-Martial Trial Guide*, Naval Justice School, pp. 4-5, contains

When charges are referred to summary court-martial, then, the accused has a choice as to which he is fully informed: He can consent to trial by the "simple form of procedure" afforded by the summary court-martial, or he can demand full courtroom procedure with appointed counsel. In each option there are benefits and disadvantages to the accused. The summary court-martial offers more rapid disposition and, in the event of conviction, exposure only to low levels of punishment [45] and to less opprobrium than would result from a special court-martial conviction, while the special court martial offers more elaborate procedural safeguards.

There is no substantial problem with respect to the voluntariness of the waiver. In related contexts this Court has held that the government may properly offer incentives to an accused which encourage the waiver of procedural rights. For example, the range of procedures available to the plaintiffs in the

---

similar language. Rather than requiring that the accused must have the opportunity to consult with counsel prior to the decision, the Navy guidebook provides only that the accused be given time to consider his decision. Presumably, the reason for this difference is that counsel is often not available at Navy and Marine Corps commands, particularly at sea.

[45] A summary court-martial may impose no more than 30 days' confinement and forfeiture of two-thirds pay for one month. It may not order a punitive discharge. In contrast, a special court-martial may award up to six months' confinement, a bad conduct discharge, and six months' forfeiture of pay. These penalties are, however, subject to the limitations contained in the Table of Maximum Punishments (*Manual*, 127*c*) for each offense.

instant case is analogous to the two-tier court system for adjudicating minor offenses which this Court upheld in *Colten* v. *Kentucky*, 407 U.S. 104. There, the accused was convicted of disorderly conduct in an inferior court and fined $10. In accordance with local procedure, he subsequently demanded a trial *de novo* in a court of general jurisdiction, where he was convicted again and fined $50. The accused contested this result, arguing, *inter alia*, that the power of the circuit court to impose punishment in excess of that imposed by the inferior court placed an impermissible burden on the demand for trial *de novo*.

In upholding this procedure, this Court observed (407 U.S. at 114) that the inferior court lacks some of the constitutional safeguards provided in more serious criminal cases. These courts, it noted (*id.* at 117), " 'are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience * * *.' " Significantly, the Court stressed the state's interest in " 'conveni[ent], * * * speedy and inexpensive means of disposition of charges of minor offenses * * *.' " *Ibid.*

Similarly, the state may encourage guilty pleas, and waiver of full trial procedure because there is a legitimate governmental interest in the expeditious settlement of litigation by plea bargaining. See *Santobello* v. *New York*, 404 U.S. 257; *North Carolina* v. *Alford*, 400 U.S. 25. The legitimate military interest in expeditious handling of minor disciplinary problems likewise justifies the provisions for waiver

of formal court-martial procedures by acceptance of a trial by summary court.[46]

United States v. *Jackson*, 390 U.S. 570, does not indicate otherwise. There, the accused was indicted for a violation of the Federal Kidnapping Act, 18 U.S.C. 1201(a), which provided that only a jury could impose the death penalty. Jackson moved to dismiss the indictment on the ground that the Act "chilled" his rights to plead not guilty and to have a jury trial by subjecting him to the death penalty if he asserted these rights. Although it rejected Jackson's claim that the indictment should be dismissed, this Court held that the death penalty provision of the Act was invalid. It noted that the legitimate goal of limiting the death penalty to cases in which the jury recommends it was insufficient to justify the incidental burden on the exercise of constitutional rights, since Congress could have accomplished the same purpose without penalizing defendants who demand jury trials.[47]

---

[46] The right to counsel is no more fundamental than other procedural safeguards which this Court has held the defendant may be encouraged to relinquish. See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742 (right to trial by jury); *McMann* v. *Richardson*, 397 U.S. 759 (same); *Parker* v. *North Carolina*, 397 U.S. 790 (same); *McGautha* v. *California*, 402 U.S. 183, 208-220 (right to testify or remain silent); *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (right to appeal).

[47] As an example of an acceptable alternative, the Court pointed out (390 U.S. at 582) that "[i]n some States * * * the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined."

Although in *Jackson* the Court concluded that the death penalty provision was invalid, subsequent decisions of this Court have explicitly held that the decision does not stand for the proposition that a guilty plea is involuntary because induced by a fear that a more serious punishment might result from the exercise of the right to trial. *E.g.*, *Brady* v. *United States*, 397 U.S. 742, 751; *North Carolina* v. *Alford*, 400 U.S. 25, 31.

The situation of the accused servicemen here, who decided to accept the summary court-martial rather than assert their right to counsel and risk more severe punishment by special court-martial, is similar to that of the defendant in *Brady*, who decided to plead guilty rather than assert his right to a jury trial and risk the death penalty. Their waiver of their right to counsel is no less voluntary and knowing than was Brady's waiver of his right to a jury trial.[48]

III. Even If Defense Counsel Must Be Appointed at Summary Courts-Martial, Such a Requirement Should Not Be Applied Retroactively.

The summary courts-martial at issue here took place in February, 1973, eight months prior to the

---

[48] Since the increased penalties to which a serviceman rejecting a summary court-martial may be subjecting himself are far less stringent, they are inherently less potentially coercive than the death penalty involved in *Jackson* and *Brady*. Thus the serviceman's decision to waive his procedural rights and subject himself to a summary court-martial is even more clearly voluntary than the defendant's plea in *Brady*.

Ninth Circuit's decision in *Daigle* v. *Warner*, which held that in certain complex cases there is a due process right to appointed counsel at summary courts-martial. The court of appeals remanded this case to the district court for reconsideration in light of *Daigle*, thereby giving the *Daigle* rule retroactive effect.

The retroactive application of *Daigle* is contrary to the precedents upon which *Daigle* was based. In *Daigle*, the court of appeals relied on *Gagnon* v. *Scarpelli*, *supra*, which set forth the circumstances in which counsel is required in probation revocation hearings. In *Scarpelli*, this Court, in turn, relied upon *Morrissey* v. *Brewer*, *supra*, which enunciated procedural guidelines for parole revocation hearings and stated that the new requirements would be applicable only to future revocations of parole (408 U.S. at 490).[49]

If, contrary to our submission, this Court holds that defense counsel must be appointed at summary courts-martial, it would be inappropriate to give retroactive effect to such a ruling, whether it is grounded on the Fifth or Sixth Amendment.

This Court has delineated three factors which are relevant in determining whether constitutional rulings should be applied retroactively: (a) the purpose to be served by the new standards; (b) the extent

---

[49] We note that the Court has recently declined to consider a contention that the *Morrissey* standards are retroactive. *Landman* v. *Carlson*, 463 F.2d 218 (C.A. 5), certiorari denied, 410 U.S. 985.

of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of new standards. See, *e.g.*, *Linkletter* v. *Walker*, 381 U.S. 618, 629, 636; *Tehan* v. *Shott*, 382 U.S. 406, 410-418; *Johnson* v. *New Jersey*, 384 U.S. 719, 726-727; *Stovall* v. *Denno*, 388 U.S. 293, 297; *DeStefano* v. *Woods*, 392 U.S. 631; *Desist* v. *United States*, 394 U.S. 244; *Williams* v. *United States*, 401 U.S. 646; *Adams* v. *Illinois*, 405 U.S. 278; *Michigan* v. *Payne*, 412 U.S. 47; *Gosa* v. *Mayden*, 413 U.S. 665. None of these factors calls for retroactive application of a rule requiring counsel in summary courts-martial.

A. In applying the "purpose" criterion, the Court has held in favor of retroactivity when the purpose of the rule is "to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States*, *supra*, 401 U.S. at 653. That a new rule is aimed at improving the accuracy of the fact-finding process, however, does not in itself mandate retroactive application. Rather, as the Court observed in *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 728-729: "* * * the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. * * * We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the

integrity of the truth-determining process at trial." See *Gosa* v. *Mayden*, *supra*, 413 U.S. at 680; *Michigan* v. *Payne*, *supra*, 412 U.S. at 55.

In accordance with this reasoning, this Court has determined that the procedural safeguards set forth in both *Morrissey* v. *Brewer* and *Wolff* v. *McDonnell* should not be given retroactive effect "[d]espite the fact that procedures are related to the integrity of the fact-finding process * * *." *Wolff* v. *McDonnell*, *supra*, slip op. at 32.[50] But in assessing the probability of reliability in the context of civilian criminal prosecutions, the Court has held retroactive the right to counsel at trial (*United States* v. *Tucker*, 404 U.S. 443; *Berry* v. *City of Cincinnati*, 414 U.S. 29); on appeal (*Douglas* v. *California*, 372 U.S. 353); and at some forms of arraignment (*Arsenault*

---

[50] In *Desist* v. *United States*, 394 U.S. 244, 249-50, n. 14, the Court noted other situations in which retroactivity had been denied despite the fact that the purpose of the rule was closely related to the reliability of the fact-finding process:

> Cf. *Stovall* v. *Denno*, 388 U.S. 293, 298, where it was conceded that "the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence"; *Johnson* v. *New Jersey*, 384 U.S. 719, 730, where it was recognized that "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation"; and *Tehan* v. *Shott*, 382 U.S. 406, 414, where it was stated that "the 'purpose' of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents," including "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Id.* at 414-415, n. 12.

v. *Massachusetts*, 393 U.S. 5).[51] As the Court observed in *Stovall* v. *Denno*, *supra*, 388 U.S. at 297-298, however, in all of these cases denial of the right "must almost invariably" preclude a fair hearing. This conclusion, of course, is based on the underlying rationale of *Argersinger* and related cases that it is grossly unfair to deny counsel to a layman accused in civilian criminal proceedings when he is opposed by the vast prosecutorial machinery of the state. See *United States* v. *Tucker*, 404 U.S. 443, 447-448, n. 5.

As we have discussed (*supra*, pp. 31-34), the summary court-martial bears little resemblance to the civilian criminal proceedings considered by this Court in cases such as *Argersinger*. At summary courts-martial, there is no long docket, and no complex bureaucracy or set of procedures for the accused to understand. More important, there is no prosecutor. Instead, there is an impartial summary court-martial officer, who is duty-bound to "assure that the interests of both the Government and the accused are safeguarded." *Manual*, 79*a*. Even without personal defense counsel, then, the summary court-martial proceeding is fair and balanced.

Since there is no reason to suppose that the absence of defense counsel at past summary courts-martial has probably produced factually improper results in a relatively large number of cases, a new require-

---

[51] But see *Adams* v. *Illinois*, 405 U.S. 278, denying retroactive application of *Coleman* v. *Alabama*, 399 U.S. 1, which affirmed the right to counsel at preliminary hearings. *Stovall* v. *Denno*, 388 U.S. 293.

ment that defense counsel are required before that tribunal should not be applied retroactively. See *Williams* v. *United States*, 401 U.S. 646, 655-656, n. 7; *Michigan* v. *Payne*, 412 U.S. 47, 53-54; *DeStefano* v. *Woods*, 392 U.S. 631, 633-634 (*per curiam*).

B. The factor of governmental reliance militates with unusual force here in support of prospectivity. The one-officer military court has been in existence since 1862; the form of the one-officer court has been essentially the same as the present day summary court-martial since 1890 in the Army and since 1909 in the Navy. (See note 25, *supra*.) As recently as 1968, Congress reaffirmed its judgment that defense counsel should not be required at summary courts-martial. Thus, the one-officer summary court has been a "firmly established" procedure for more than 100 years. *DeStefano* v. *Woods*, *supra*, 392 U.S. at 634-635. It was not until June of 1972, with this Court's decision in *Argersinger*, that the armed forces had any reason even to suspect that these procedures might be insufficient.

C. The need for prospectivity emerges most clearly in consideration of the third criterion—the effect of retroactivity on the administration of justice. In recent years there have been many tens of thousands of summary court-martial convictions (see note 24, *supra*), and there is no limit on the number of these cases which might have to be reopened in the event of retroactive application.[52] This Court held in *Berry*

[52] If the right to counsel were based solely on the Sixth Amendment, only those cases resulting in confinement would

v. *City of Cincinnati*, 414 U.S. 29, that the *Argersinger* rule is retroactive as to those who allege a case or controversy within the jurisdiction of the federal courts. In the civilian context, the number of valid claims under *Argersinger* would be limited to cases in which the accused is still in confinement, *Adams* v. *Illinois*, 405 U.S. 278, 295 (Douglas, J., dissenting), or still suffers from other substantial disabilities resulting from the conviction. *St. Pierre* v. *United States*, 319 U.S. 41; *Berry* v. *City of Cincinnati*, *supra*, 414 U.S. at 30; *Burgett* v. *Texas*, 389 U.S. 109; *United States* v. *Tucker*, 404 U.S. 443; *Kitchens* v. *Smith*, 401 U.S. 847; *Loper* v. *Beto*, 405 U.S. 473.

As a practical matter, such limitations will not restrict the number of claims resulting from summary courts-martial. Courts-martial, unlike civilian criminal proceedings, typically result in monetary penalties (usually either reductions in rate or forfeitures of pay); such cases do not become moot and the accused has an incentive to reopen the case.[53] Moreover, if the right to counsel at summary courts-martial is retroactive, persons who were denied that right at any time in the past may petition the Judge

---

be affected; there is presumably no such limit on the Fifth Amendment right.

[53] In addition, court-martial convictions have ramifications beyond the criminal law. See *Gosa* v. *Mayden*, *supra*, 413 U.S. at 683: "Retrospective application * * * would not only affect the validity of many criminal convictions but would result in adjustments and controversy over back pay, veterans' benefits, retirement pay, pensions, and other matters."

Advocate General for relief under Article 69 of the UCMJ (10 U.S.C. 869). No limitations period and no case-or-controversy requirements or other jurisdictional limitations apply to this review.

Thus, the conclusion that the right to counsel in summary courts-martial is retroactive could result in the reopening of almost any single-officer court-martial, no matter when conducted. It could also reopen thousands of punishments imposed at special and general courts-martial in which summary court-martial convictions of the accused were admitted, during the presentencing procedure, as evidence in aggravation of the offense. *Manual*, 75*b*(2). See *United States* v. *Alderman*, *supra*.

Moreover, the facts upon which the validity of the summary court-martial conviction rests often would be impossible to discover at this late date. Although it would be easy to determine whether a summary court-martial resulted in confinement, *Alderman* holds that the denial of counsel invalidates such a proceeding only if the accused "was, like Argersinger, 'indigent' and entirely unrepresented by counsel." 22 U.S.C.M.A. at 300. Since the summary court-martial record does not contain information concerning indigency, that issue could not be determined on the record. The Ninth Circuit's due process analysis does not explicitly limit the right to appointment of counsel to indigent servicemen, but it would be even harder to apply retroactively than *Alderman*. Under the *Daigle* analysis, it would be necessary to determine, usually without substantial help from the

record, whether the charges or the material in extenuation were so complex as to make counsel necessary, and, if so, whether adequate counsel was unavailable due to military exigencies and the accused was unduly prejudiced.

In comparison to the government's interest in the repose of existing court-martial determinations, the individual's interest in favor of retroactivity is insignificant.[54] No one is presently confined under sentence of a summary court-martial wherein he was not given the opportunity to be represented by counsel.[55] The interest of those who would benefit from a retroactivity ruling, therefore, is entirely pecuniary.

The purpose of *Argersinger* was not to prevent misdemeanor convictions without counsel, but confinement without counsel. As the Court stated (407

---

[54] In other contexts this Court has viewed the impact of retroactivity on the government in relation to the private interest at stake. See, *e.g.*, *Wolff* v. *McDonnell*, *supra*, slip op. at 32:

> Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures.

See also *Robinson* v. *Neil*, 409 U.S. 505, 509-510.

[55] Confinements ordered in summary courts-martial may not exceed one month; for over a year regulations have been in effect in all military services which prohibit summary courts-martial unless the requirements of *Alderman* are satisfied. *Supra*, note 16.

U.S. at 40): "The run of misdemeanors will not be affected by today's ruling." If the Court should decide that *Argersinger* requires counsel before a summary court-martial may impose confinement, there would be no need for retroactive application since "[t]hat which was constitutionally invalid" in past summary courts-martial (*i.e.*, the confinement) has already been "isolated and excised" by the passage of time.[56]

---

[56] See *Robinson* v. *Neil*, *supra*, 409 U.S. at 509-510, in which the Court, balancing the private and governmental interests, determined that *Furman* v. *Georgia*, 408 U.S. 238, should be only partially retroactive:

> In *Furman* v. *Georgia*, * * * our mandate was tailored so as to deny to the State only the authority to impose a punishment that we held unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus, the prejudice to the State resulting from the necessity of an entirely new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again assembling witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REAR ADM. MERLIN H. STARING,
Judge Advocate General,

REAR ADM. H. B. ROBERTSON, JR.,
Deputy Judge Advocate General,

COL. MAX G. HALLIDAY,
Assistant Judge Advocate General (Military Law),

COMDR. LAWRENCE M. FARRELL,
LT. ROBERT H. WELLEN,
Attorneys,
Judge Advocate General's Corps,
United States Navy.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
HARVEY M. STONE,
Attorneys.

DECEMBER 1974.

APPENDIX

Uniform Code of Military Justice (10 U.S.C. 801 *et seq.*)

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 824. Art. 24. Who may convene summary courts-martial

(a) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) When only one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior, competent authority when considered desirable by him.

Manual for Courts-Martial, United States, 1969 (Revised Edition)

16. JURISDICTION OF SUMMARY COURTS-MARTIAL. *a. Persons and offenses.* Subject to the regulations prescribed in 13, summary courts-martial have the power to try persons subject to the code except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen for any noncapital offense made punishable by the code. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. This is true even though the person may also have refused punishment under Article 15 and demanded trial by court-martial. Sec. 132. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial, as may be appropriate (Art. 20).

The principles stated in 15*a*(2) and (3) apply to summary courts-martial.

b. Punishments. Summary courts-martial may, under such limitations as the President

may prescribe (125-127: Art. 56), adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to certain specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay (Art. 20); but in the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next inferior grade.

The maximum amount of confinement and forfeiture of pay or of confinement and detention of pay, may be adjudged together in one sentence. Since confinement and restriction to limits are both forms of deprivation of liberty, only one of those punishments may be adjudged in a maximum amount in any one sentence. An apportionment must be made if it is desired to adjudge both forms of punishment—confinement and restriction to limits—in one and the same sentence. For example, assuming the punishment to be in conformity with other limitations, a summary court-martial might adjudge confinement at hard labor for 15 days (one-half of the authorized confinement), restriction to limits for 30 days (one-half of the authorized restriction), and forfeiture of two-thirds pay for one month. In such a case, the more severe form of deprivation of liberty is served first, the less severe thereafter.

79. SUMMARY COURTS-MARTIAL. *a. Function.* The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115: Art. 46) and to take depositions in proper cases (117: Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form. The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes

are required, the court will refer the matter to the convening authority. See 33*d*.

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*e*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the

charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

> The elements of the offense to which the plea of guilty relates;
>
> That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;
>
> The maximum authorized punishment which may be adjudged upon conviction; and
>
> That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading

guilty because he is convinced that he is in fact guilty. See 70*b*(3).

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at once to find the accused guilty. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and obtain such other evidence as may

tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accused full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c*; app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b* (2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

e. Record. Unless otherwise prescribed by regulations of the Secretary of a Department, the procedures provided herein are applicable to summary court-martial records. So much of the proceedings as relate to pleas, findings, and sentence must be recorded in the appropriate place on all copies of the charge sheet. The number of previous convictions considered and the fact that the accused was advised of the matters outlined in 79*d* will also be noted in the spaces provided on all copies of the charge sheet. Unless otherwise prescribed by the convening or higher authority, the evidence considered by the summary court-martial need not be summarized or attached to the record of trial. The summary court should, however, line out and initial the name or names of any witnesses who are listed on the charge sheet but who were not called to testify. If the testimony of witnesses other than those listed was considered, the court should insert their names and addresses on all copies of the charge sheet and note whether they testified for or against the accused. The summary court will authenticate the record by signing each copy. He will forward all copies and the accompanying papers without formal letter of transmittal to the convening authority. If the summary court is the only officer present with the command, the record will so state, and that officer thereafter holds the record as convening authority for purposes of review. For disposition of summary court-martial records, see 91*c*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 564702 79

Nos. 74-175 and 74-5176

In the Supreme Court of the United States

OCTOBER TERM, 1975

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL PARTIES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:	Page
Argersinger v. *Hamlin*, 407 U.S. 25	2, 12
Burns v. *Wilson*, 346 U.S. 137	6
Gusik v. *Schilder*, 340 U.S. 128	8, 11
McLucas v. *DeChamplain*, 421 U.S. 21	10
McLucas v. *DeChamplain*, 421 U.S. 21	10
Noyd v. *Bond*, 395 U.S. 683	8
Parisi v. *Davidson*, 405 U.S. 34	8
Schlesinger v. *Councilman*, 420 U.S. 738	7, 8, 10, 11
United States v. *Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298	2, 4
United States v. *Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192	8
Statutes:	
All Writs Act, 28 U.S.C. 1651(a)	7
Uniform Code of Military Justice, Article 69, 10 U.S.C. 869	7, 9
Miscellaneous:	
Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009 (1974)	6
Manual for Courts-Martial, 1969 (Rev. ed.), par. 110A	7
Manual of the Judge Advocate General, section 0144, 32 C.F.R. 719.144	7

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–175

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

No. 74–5176

DANIEL EDWARD HENRY, ET AL., PETITIONERS

v.

J. WILLIAM MIDDENDORF, II, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL PARTIES

This supplemental memorandum is filed in order to update some of the statistics in our main brief and to discuss plaintiffs' claim that this case should be dismissed because they failed to exhaust their military remedies.

1. In our main brief (pp. 23–27), we summarized statistical data showing how application of the judicial requirement of counsel to summary courts-martial [1] has affected the congressional objective of providing a means for prompt and effective punishment for minor military infractions. These statistics indicated that the provision of defense counsel in summary courts-martial has introduced significant delay and reduced the utility of the summary court-martial procedure without producing apparent countervailing benefit to accused servicemen.

Statistics that have become available since the filing of our brief last Term reinforce these conclusions. In both the Army (which began providing counsel in summary courts-martial in mid-1972, shortly after the decision in *Argersinger*) and the Navy (which applied *Alderman* to summary courts-martial beginning June 8, 1973), the number of summary courts-martial sharply declined following the institution of the procedures entailing provision of counsel. The new statistics reflect a continuing trend away from the use of summary courts-martial: [2]

---

[1] See *United States* v. *Alderman*, 22 U.S.C.M.A. 298, 46 C.M.R. 298, holding that *Argersinger* v. *Hamlin*, 407 U.S. 25, requires that counsel be made available to indigent servicemen subject to incarceration as a result of summary courts-martial.

[2] Our main brief, p. 23, n. 24, gives the frequency of summary courts-martial from 1964 through 1973. The yearly figures for the two services are statistically not quite comparable. The Army statistics refer to calendar years, whereas the Navy and Marine Corps statistics refer to fiscal (July 1–June 30) years.

Numbers of summary courts-martial per year

Year	Army	Navy
1971	14, 740	14, 097
1972	9, 322	11, 308
1973	6, 434	11, 322
1974	4, 803	8, 941
1975		[1] 8, 677

[1] Interim.

These data suggest that one of the principal effects of the requirement that counsel be provided in summary courts has been to diminish the attractiveness of that procedure as a means for speedy and effective disposition of relatively minor charges and presumably to cause a shift to the use of special courts or non-judicial punishment.[3]

Where the summary court-martial procedure has continued to be used, it has recently proved a far less expeditious procedure than before. While it is not possible to ascribe the changed experience reflected in the following table exclusively to the injection of

[3] Whereas the convening of summary courts-martial declined by 23 percent between FY 1973 (the last full year the Navy did not provide counsel) and FY 1975, the use of special courts-martial not empowered to issue bad conduct discharges—those most nearly comparable to summary courts-martial—increased by 26 percent, while instances of non-judicial punishment increased by 23 percent in that time. Similarly, the Army's use of summary courts declined by 67 percent between 1971, the last full year in which the Army did not provide counsel, and 1974, while the use of special courts-martial dropped by only 44 percent and non-judicial punishment by 31 percent in that time.

counsel into summary court proceedings, we believe it is reasonable to infer that the presence of defense counsel is the principal cause of this phenomenon. The following table, adding to the statistics contained at page 26, n. 26 of our main brief, suggests that counsel have caused relatively little change in the outcome of summary court proceedings but have lengthened by as much as 40 percent the time required to dispose of charges for which a summary court is convened: [3a]

	FY 1973	*CY 1974*
Total summary courts-martial	11,322	8,869
Convictions	10,779	8,297
Acquittals	543	572
Percentage of acquittals	4.8	6.4
Percentage of convictions	95.2	93.6
Average number of days from preferral of charges through final review	32.52	45.40

If both the increased delay and the decreased conviction rate are ascribed to the introduction of counsel into the proceedings, the foregoing statistics indicate that the presence of defense counsel at summary courts-martial has materially diminished the utility of that procedure without any appreciable advantage to the accused. Thus, in calendar year 1974 there were 8,869 summary courts-martial in the Navy; multiplying that figure by 13 (the average number of additional days from preferral of charges to final review in 1974 as compared to fiscal 1973), it appears

---

[3a] We have compared FY 1973, the last 12-month period before counsel was provided in summary courts-martial by the Navy pursuant to *Alderman*, with calendar year 1974, the last 12-month period for which final figures are available.

that the presence of defense counsel in summary courts-martial in 1974 created an additional 115,000 man-days during which accused servicemen faced unresolved charges; in the same period, the slightly higher acquittal rate produced about 150 additional acquittals. Under this analysis, each acquittal has thus cost about 770 man-days of delay. This is a high price in view of the fact that the use of defense counsel does not necessarily improve the accuracy of the fact finding process (see our main brief, pp. 41–43), and thus that the additional acquittals do not necessarily represent an improvement in the fairness of the procedures.

These data reinforce our view that the summary court-martial in the form Congress intended—an expeditious non-adversarial procedure—is a reasonable accommodation of the private and governmental interests at stake.[4] The inquisitorial role of the court officer provides a speedy yet fair disposition of minor charges; the interjection of defense counsel into these proceedings has created an adversarial character which lengthens the process without making it mark-

[4] The most recent statistics also reflect that summary courts-martial continue to be utilized for minor—and, generally, purely military—offenses. More than half of all charges tried by summary courts-martial continue to involve unauthorized absence; more than 30 percent of the charges involved other purely military offenses, such as disrespect to a superior or disobedience of an order.

The chart below, updating statistics in our main brief at p. 33, n. 31 (which contained interim data for 1973), shows the num-

edly fairer.[5] In providing for the summary court-martial, Congress deliberately decided to entrust the active conduct of the trial to an impartial officer rather than opposing counsel. This decision is entitled to special deference from the courts, since it is the special constitutional role of Congress to balance the rights of servicemen against the unique needs of the armed forces, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137,

---

bers of charges tried by Navy summary courts-martial under different Articles of the U.C.M.J. and the percentage each type of offenses comprises of the total:

Article Offense	FY 1973		FY 1974	
	Number	Percent	Number	Percent
85–87: Desertion, unauthorized absence, missing movement	8,629	52.8	6,894	52.5
89–92:				
Disrespect, disobedience	3,237	19.8	3,148	24.0
Other military offenses	2,173	13.3	1,273	9.7
121: Larceny	508	3.1	375	2.8
128: Assault	464	2.8	365	2.8
92/134:				
Drug offenses	859	5.3	857	6.5
Other nonmilitary offenses	476	2.9	225	1.7
Total military offenses	14,039	85.9	11,315	86.2
Total nonmilitary offenses	2,307	14.1	1,822	13.8
Total offenses	16,346	100.0	13,137	100.0

Note: Statistics supplied by the Office of the Judge Advocate General, Department of the Navy. The number of offenses exceeds the number of summary courts-martial convened (p. 4, *supra*) because more than one offense may be adjudicated in a single proceeding.

[5] See generally, Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009 (1974).

140; indeed, this Court has never invalidated a congressional provision governing court-martial proceedings against servicemen.

2. Plaintiffs now claim that the civilian review they sought was precluded by their failure to exhaust two military remedies: (1) a petition for relief to the Judge Advocate General of the Navy, pursuant to Article 69 of the Uniform Code of Military Justice (10 U.S.C. 869);[6] and (2) a petition for *habeas corpus* relief from the Court of Military Appeals pursuant to the extraordinary powers granted by 28 U.S.C. 1651(a) (the All Writs Act). We disagree.[7]

The failure to exhaust is not an absolute bar to a court's assertion of jurisdiction. Rather, application

---

[6] Article 69 provides in pertinent part:

"Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused."

An accused may initiate an application for relief under Article 69 by submitting a letter to the Judge Advocate General which sets forth the grounds for relief. See *Manual of the Judge Advocate General*, section 0144, 32 C.F.R. 719.144.

The Judge Advocate General of the Navy, as a matter of administrative practice, reviews cases submitted pursuant to Article 69 solely with respect to errors asserted in the application for relief. See *Manual for Courts-Martial*, 1969 (Rev. ed.), par. 110A; *Manual of the Judge Advocate General*, *supra*.

[7] As we indicated in our main brief (p. 4, n. 5), we do contend that the district court improperly asserted jurisdiction over those plaintiffs who were never tried by summary courts-martial. *Schlesinger* v. *Councilman*, 420 U.S. 738, 753–761.

of the exhaustion doctrine to specific cases is a discretionary matter depending upon the doctrine's purposes and the particular system of remedies which precede civilian review in the federal courts. See *McKart* v. *United States,* 395 U.S. 185, 193; *Parisi* v. *Davidson,* 405 U.S. 34, 37; *Schlesinger* v. *Councilman,* 420 U.S. 738, 754; *Gusik* v. *Schilder,* 340 U.S. 128, 132. In light of the military review to date and the purposes of the exhaustion doctrine, this case is ripe for review.

We do not believe that a request for *habeas* relief from the Court of Military Appeals pursuant to the All Writs Act is necessary to exhaust military remedies. Such a request is in the nature of a collateral attack on the conviction, rather than a means of direct review necessary before a judgment can properly be considered finally determined at the appropriate level within the military.

There is, moreover, a substantial question whether the Court of Military Appeals can grant extraordinary relief following a summary court-martial conviction (*e.g., United States* v. *Snyder,* 18 U.S.C.M.A. 480, 40 C.M.R. 192 ; see also *Noyd* v. *Bond,* 395 U.S. 683, 695, n. 7)—especially when, as here, the petitioning servicemen are no longer confined. Thus, the remedy which plaintiffs point to may not exist. *Noyd* v. *Bond, supra,* 395 U.S. at 698, n. 11; *Parisi* v. *Davidson, supra,* 405 U.S. at 44.

Plaintiffs argue that the remedy does exist, because in response to a timely petition for *habeas* relief

by plaintiff McLean, the Court of Military Appeals in February, 1973, ordered the Judge Advocate General of the Navy to show cause why McLean should not be released from confinement on the ground that he had been sentenced to confinement after a summary courtmartial in which he was denied the right to appointed counsel (Plaintiff's Supplemental Memorandum, Exh. A). But the order to show cause indicated only that the court was willing to consider the question of its jurisdiction; there has been no holding that jurisdiction exists.

In any event, following the grant of relief to plaintiffs by the district court in this case, the Court of Military Appeals removed McLean's *habeas* petition from its calendar. That removal, followed by a lapse of two years without further action on the matter, can reasonably be interpreted as a decision to defer to the determination of the federal courts.[8]

For similar reasons, we do not believe that the plaintiffs' failure to seek Article 69 review should bar judicial review under the circumstances of this case. We agree that normally an Article 69 petition for relief is a prerequisite to judicial review. See our response to the certiorari petition in *Wishmeyer* v. *Bolton,* No. 75–5203. But although no such petition has been filed by the servicemen involved in these

[8] Indeed, by order of October 24, 1975, the Court of Military Appeals continued its order holding the action in abeyance, "out of deference to consideration by the United States Supreme Court" of the issue presented by petitioner McLean (USCMA Misc. No. 73–5).

cases, the Judge Advocate General of the Navy has received at least seven Article 69 petitions which allege as error the conducting of summary courts-martial resulting in confinement without provision of counsel to the accused. In each case, the Judge Advocate General has deferred consideration of the petition until litigation on this issue in the federal courts, including this case, has been completed.

Under these particular circumstances, the military has indicated its intention to defer to the civilian courts for the resolution of this matter, and accordingly the traditional purposes of the exhaustion doctrine will not be significantly furthered by requiring additional military review.

These purposes were summarized with reference to military tribunals last Term in *Schlesinger* v. *Councilman*, 420 U.S. 738, 756–757.[9]

> The * * * rule [of exhaustion of administrative remedies], looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks, is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by

[9] Contrary to plaintiff's assertions (Supplemental Memorandum, p. 1), this Court's decisions in *Councilman*, *supra* and *McLucas* v. *DeChamplain*, 421 U.S. 21—both rendered after oral argument in this case—raise no "new questions" of jurisdiction, but rather reaffirm traditional principles.

> the agencies' own decisions. It often avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention. * * *
>
> These considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings.

In addition, the doctrine as applied to the review of military tribunals is designed to permit the military to order its own affairs and to minimize friction between military and civilian tribunals. See *Councilman, supra,* 420 U.S. at 757–758; *Gusik* v. *Schilder, supra,* 240 U.S. at 132.

Since both the Judge Advocate General of the Navy and the Court of Military Appeals have deferred to the civilian courts for a resolution of the judicial conflict concerning the right to counsel at summary courts-martial, the purposes of the exhaustion doctrine would not be significantly enhanced by holding that civilian review was premature in this case. Exhaustion of the remedies allegedly remaining here would not develop important facts or refine the issues for review. Most importantly, exhaustion cannot be urged here as a means of avoiding friction between federal and military tribunals. Indeed, if this Court does not determine the constitutionality of summary courts-martial, the disagreement between civilian and military courts would continue and could increase since the conflicting decisions of the Court of Military

Appeals and the Ninth Circuit on this issue would remain unresolved. See our main brief, pp. 8–9.

This Court should resolve these conflicting decisions generated by *Argersinger*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.